Petition

Office - Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

81-1084
No.

IN THE

Supreme Court of the United States

October Term, 1981

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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December, 1981

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTIONS PRESENTED

1. Whether and to what extent the so-called "DT&I" traffic conditions imposed by the I.C.C. in a railroad merger or control case have a bearing in a subsequent application for abandonment of a line of railroad involved in the merger or control.

2. Whether the designation under 49 U.S.C. 10904(e) by a carrier that a line of its railroad is planned for abandonment should be a required factor for consideration by the I.C.C. in evaluating the availability of alternate rail service in an area.*

*Petitioners in the court of appeals are People of the State of Illinois, Illinois Commerce Commission, Pulaski County, Alexander County, Tammsco, Inc., Perks Grain Company, C.F. Casper, and John W. McGinness; Intervening petitioners are Cairo Chamber of Commerce, Southern Illinois Transportation Association, and City of Cairo; Respondents are United States of America and Interstate Commerce Commission. Intervening respondent is Missouri Pacific Railroad Company.

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IN THE

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OCTOBER TERM, 1981

No. _____

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, People of the State of Illinois, Illinois Commerce Commission, Pulaski County, Alexander County, Tammsco, Inc., Perks Grain Company, C.L. Casper, and John W. McGinness, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on October 5, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 1a-17a) is unreported. The opinion of the Interstate Commerce Commission (App. D, 20a-38a) is unreported. The further opinion of the Commission (App. E, 39a-44a) is unreported. The opinion by Division 1 of the Commission (App. F, 45a-53a) is reported at 354 I.C.C. 789. The opinion of the Administrative Law Judge of the Interstate Commerce Commission (App. G, 54a-68a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. A, 17a) was entered October 5, 1981. Petitioners' timely petition for rehearing was denied November 3, 1981. (App. B, 18a) On November 27, 1981, that Court stayed issuance of its mandate until December 10, 1981, pending petition for a writ of certiorari. (App. C, 19a). The jurisdiction of the Supreme Court is conferred by 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

The statutes primarily involved are 49 U.S.C. 10903(a) and 49 U.S.C. 10904(e)(2):

49 U.S.C. 10903(a):

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may —
>
> (1) abandon any part of its railroad lines; or
>
> (2) discontinue the operation of all rail transportation over any part of its railroad lines;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

49 U.S.C. 10904(e)(2):

> Each rail carrier shall maintain a complete diagram of the transportation system operated,

directly or indirectly, by the carrier. The carrier shall submit to the Commission and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall –

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the carrier plans to file an application for a certificate under subsection (a) of this section.

STATEMENT

This proceeding was instituted directly in the Court of Appeals to review the I.C.C.'s approval of a 25.7-mile railroad abandonment in southern Illinois. The abandonment application was filed in November, 1972 – over 9 years ago – by Chicago & Eastern Illinois Railroad Company (C&EI) for its main line between Joppa Junction and Fayville Junction[1] The battle over the proposed abandonment has been quite heated and extensive.

C&EI connected with Missouri Pacific Railroad Company (MoPac) in the Fayville/Thebes area to form a through route across the Mississippi River at Thebes, Illinois/Illmo, Missouri.

C&EI was acquired by MoPac in 1967, when a contested struggle with Illinois Central Railroad Company for stock

[1]Originally, the proceedings also involved the abandonment by C&EI of trackage rights over MoPac between Fayville Junction and Thebes Junction, and over St. Louis-San Francisco Railway Co. between Rockview and Chaffee, Mo., but these other applications were withdrawn. (App. D, 20a).

control was decided by the I.C.C. in MoPac's favor, and judicially sustained. *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), *Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421 (N.D. Ill. 1966), aff'd per curiam 385 U.S. 457 (1967).

One of the major benefits visualized by MoPac's acquisition of C&EI was the improvement of service over C&EI's main line, and improvement of the connection between C&EI and MoPac in the Thebes area, by establishment of a "Fayville connection" between the two railroads. The operating distance between Chicago and Thebes would be reduced, with service by combined trains in through service. 327 I.C.C. at 341-42:

> "Missouri Pacific would construct 1,005 feet of new direct connecting tracks between its line and Eastern's. The connection would be at Fayville, about 5 miles south of Thebes, and is estimated to entail the expenditure of about $25,195. The distance between Chicago and Thebes via the Fayville connection would be 378.5 miles compared to 413.7 miles via the East St. Louis gateway, providing a savings of 35.2 miles.
>
> "Should control be authorized Missouri Pacific would propose the institution of two combined Missouri Pacific-Eastern freight schedules daily in each direction via Thebes between Chicago and points in the Southwest, in addition to . . .
>
> - - - - - - -
>
> "The proposed 10.5 hours running time schedules envision through-train service, with no local service at intermediate points. However,

> those trains would be able to make one straight setoff for Joppa traffic and the local business on the Joppa side line."

The I.C.C.'s approval of MoPac control over C&EI was made subject to the standard so-called "DT&I" conditions,[2] which require that routes, gateways, and channels of trade continue to be made available to the shipping public. 327 I.C.C. at 385:

1. Under the control of Missouri Pacific, Eastern shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until we authorize otherwise.

2. The present neutrality of handling traffic inbound and outbound and in overhead service by Eastern shall be continued so as to permit equality opportunity for service to and from all lines reaching the rails of Eastern without discrimination in the arrangement of schedules or otherwise.

3. The present traffic and operating relationships existing between Eastern, on the one hand, and, on the other, all lines connecting with its tracks, shall be continued insofar as such matters are within the control of Missouri Pacific.

4. Eastern shall accept, handle, and deliver all cars inbound and outbound and in overhead service, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

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[2]Named after the proceeding in which they were formulated. *Detroit, T. & I.R. Co. Control*, 275 I.C.C. 455, 492-93 (1950).

5. Missouri pacific shall not do anything to restrain or curtail the right of industries located on Eastern to route traffic over any or all existing routes and gateways.

6. Missouri Pacific shall refrain from closing any existing route or channel of trade with any carrier on account of its control of Eastern unless and until we so authorize.

7. Any party or person having interest in the subject matter may at any future time make application for such modification of the above-stated conditions, or any of them, as may be required in the public interest, and we will retain jurisdiction to reopen the proceeding herein on our own motion for the same purpose.

Despite the promised improvement of service over the C&EI main line, MoPac shortly after consummating control of C&EI commenced to divert traffic from C&EI's Thebes-Fayville-Joppa Junction-Benton route, in favor of MoPac's own route between Thebes and Benton. In 1972, C&EI under MoPac's control filed for abandonment of C&EI's main line between Joppa Junction and Fayville Junction.

ALJ's Decision

Hearing on the abandonment application was held in 1973 at Cairo, Illinois, before an Administrative Law Judge (ALJ), which drew substantial opposition from communities and local shippers situated on the line. The ALJ denied the abandonment, noting the harmful effect which abandonment would have on shippers. He found the decline of traffic was at least partially attributable to a temporary shortage of equipment but, more importantly, traffic was rerouted between Chicago and points in the South over the MoPac Benton-Thebes route, rather than

over the C&EI route. The ALJ found that the DT&I conditions prescribed in the *Control Case* precluded such diversion of business, and that sufficient justification has not be offered to justify waiver of the conditions. (App. G, 67a):

> "The issues raised herein, however, can be resolved very simoly. In the *Control Case* certain definite limitations were set forth when the MoPac control over the C&EI was authorized by the Commission. One limitation was that the C&EI would maintain and keep open all routes via existing junctions and gateways 'unless and until we authorize otherwise.' There were also other limitations set forth, including a mandatory observance of neutrality in handling inbound, outbound and overhead traffic by the C&EI. From the record established here, one cannot help but to conclude that these two mandatory restrictions would have to be ignored if the applications were to be granted. Sufficient justification has not been offered to justify their waiver."

The ALJ's denial of the abandonment was served April 21, 1976, due to environmental litigation. (App. A, 4a).

Division 1's Decision

C&EI appealed the ALJ's determination. The I.C.C. reopened the proceeding for further evidence. Meanwhile, MoPac in late 1976 merged with C&EI, and with another affiliate, Texas & Pacific Railway Company. *MoPac-Merger-T&P and C&EI,* 348 I.C.C. 414 (1976), modified *City of Palestine, Texas* v. *United States,* 559 F. 2d 408 (5th Cir. 1977), cert. den. 435 U.S. 950. The I.C.C. termed the merger merely a simplification of corporate structure,

which did not involve significant changes in the pattern of operations. 348 I.C.C. at 419:

> "The merger application herein does not involve significant changes in the pattern of operation of the MOPAC system, but merely represents a simplification of present MOPAC corporate structure. The proposed merger is nothing more than a consolidation of the corporate identities of the three applicant railroads, MOPAC, T&P, and C&EI. MOPAC has controlled the T&P through stock ownership for over 50 years, *Texas & Pacific Readjustment,* 86 I.C.C. 808 (1924), and has controlled the C&EI through stock ownership for over 10 years, *Missouri Pac. R. Co.-Control-Chicago & E.I.R. Co.,* 327 I.C.C. 279 (1965)."

Division 1 of the I.C.C. approved the abandonment in 1978. It stated neither of the two factors found decisive by the ALJ supported denial of the abandonment. First, there was no basis for assuming that if additional equipment were available the line would generate substantially more traffic. Secondly, the approval of the MoPac-C&EI merger, without specific routing conditions, served to eliminate the DT&I conditions. 354 I.C.C. at 796. (App. F, 52a).

Division 1 also gave consideration to the needs of Tammsco, Inc., the largest user of the line located at Tamms, in view of the fact that Illinois Central Gulf Railroad Company (ICG) had filed for abandonment of a portion of its line in the same area. However, Division 1 found that ICG had not indicated an intention to seek abandonment of its Tamms service in its system diagram map.[3]

[3] 49 CFR 1121.20. 49 U.S.C. 10904(e).

Accordingly, alternative service would be available to Tammsco in the event of a MoPac abandonment. 354 I.C.C. at 795 (App. F, 51a).

> "In considering the need for the service, we look first at Tammsco, Inc., the largest user of the line. Its facility in Tamms is located near the line of the Illinois Central Gulf Railroad Company (ICG). Applicant has offered to give Tammsco a segment of its industrial siding which connects with ICG. Tammsco does not feel this connection would provide it with long-term uninterrupted rail service. It complains that ICG has reduced service at Tamms to an 'as needed' basis and has filed for abandonment of a portion of its line. In its system diagram map, ICG has not indicated an intent to seek abandonment of its Tamms service, though, and there is no evidence that the ICG service would not meet the shipper's needs. We find that adequate alternative rail service is available to Tammsco and that it would not be adversely affected by the MoPac abandonment."

Division 1's decision was the subject of judicial review instituted in 1978.[4]

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[4]Pending at that time was ICG's bid to abandon its line north from the Tamms area to Murphysboro, IL. The Court of Appeals sustained the I.C.C.'s approval of the ICG abandonment. *Illinois Central Gulf R. Co.-Abandonment,* 354 I.C.C. 448 (1977), aff'd *People* v. *U.S.,* 601 F.2d 595 (7th Cir. 1979), cert. den. 444 U.S. 865.

The Full I.C.C. Decision

The I.C.C. recalled the case from the Court of Appeals, and reopened the abandonment proceeding with a request for further evidence. On April 21, 1980, the full I.C.C. approved the abandonment, over the dissent of Commissioner Clapp. (App. D, 20a). The I.C.C. found the line incurred a $14,147 deficit in the year 1977. (App. D, 33a).

The I.C.C. ruled that the traffic conditions in the *Merger* case have "no relevance" to the issues, as the conditions are designed to protect the interests of connecting railroads. The conditions were found not to apply to a railroad's routing of traffic over its own lines through its own internal gateways, and that the routing of bridge traffic is a matter of managerial discretion (App. D, 34a-35a):

> "After approval of the MoPac-C&EI merger in the *Merger* case, the MoPac-C&EI gateways became MoPac internal gateways. Therefore, although the *Merger* case continued to impose the standard DT&I conditions, these conditions are not relevant to operations over the abandonment segment because alternate MoPac routes are available which can handle bridge traffic with equal or greater efficiency and economy. MoPac's decision in late 1976, to start routing bridge traffic over other MoPac routes was a proper exercise of managerial discretion and did not violate the traffic conditions."

Turning to Tammsco's situation, the I.C.C. concluded that Division 1 correctly found that adequate alternative rail service is available to Tammsco. (App. D, 34a-35a).

Petition to Reopen

The parties returned to the Court of Appeals after the April 21, 1980 decision, and filed supplemental briefs. Prior to argument, ICG posted its Tamms/Cairo line on its System Diagram Map in category 1, indicating that ICG anticipates filing a formal abandonment application within 3 years. 49 CFR 1121.20(b)(1).

The objectors to the C&EI abandonment then petitioned the I.C.C. to reopen the record.

The I.C.C. denied reopening. In its decision of July 21, 1981, the I.C.C. ruled ICG's placement of its Tamms/Cairo line on its System Diagram Map is simply a "speculative hypothesis" that another abandonment "may be filed" and "may be approved". Each abandonment is to be considered separately (App. E, 42a):

> "We will not reopen the instant abandonment proceeding simply on the speculative hypothesis that another abandonment *may* be filed and *may* be approved. We believe that each abandonment case must be decided on its own merits. In addition, the Commission is not required to consider the effects of other applications. See for example, *People of Illinois* v. *United States,* 604 F.2d 519 at 1528 (7th Cir. 1979)."

Court of Apeals Decision

The Court of Appeals termed the case the first to arise dealing with the relationship of an I.C.C.-imposed merger condition to a subsequent abandonment. (Ap. A, 7a). The Court's analysis differed somewhat from the I.C.C.'s. In essence, the Court stated the purpose of the DT&I conditions is to restrain anti-competitive conduct, whereas the

decision in abandonment is to assess whether the public convenience and necessity permits the abandonment. (App. A, 7a-8a). The competition referred to by the Court primarily concerned other carriers, namely, railroads. (App. A, 9a).

The Court of Appeals found that there had not been a sufficient showing of anti-competitive injury to shippers on the line related to any indirect benefits provided to them by the anti-competitive conditions. (App., 9a). Thus, the Court ruled that the DT&I conditions do not prohibit, as a matter of law, the abandonment. Further, that the abandonment will not have an anti-competitive effect violative of the conditions. (App. A, 10a).

The Court's ruling on the DT&I conditions also determined the measurement of the financial results for operating the line. MoPac's rerouting of the traffic in 1977 after the merger, resulted in a more circuitous off-branch movement, incurring an additional cost of approximated $20,000. Thus, the court sustained the I.C.C.'s finding of a $14,147 deficit in 1977. (App. A, 15):

> "Petitioners contend that MoPac's new figures overstate off-branch costs by $20,000. Petitioners' argument is based upon a projection from the off-branch cost/revenue ration existing prior to 1977. The projected figures ignore the reality that traffic routing patterns changed in 1977. (note 20) The rerouting has been upheld earlier in this opinion."

Finally, with respect to Tammsco, Inc. and adequate alternate service from ICG, the Court stated that the fact ICG may subsequently abandon the line should not be considered in this case. The listing by ICG of the line on its System Diagram Map means only that an application *may be filed* within three years. Each abandonment should be

decided on its own merits, and if every hypothetical abandonment must be considered a case might never close (App. A, 16a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals has decided questions of federal law which are important and recurring, warranting review by the Supreme Court of the United States.

I. THE DECISION OF THE COURT OF APPEALS ERRS IN ITS APPLICATION OF THE DT&I MERGER CONDITIONS TO AN ABANDONMENT.

While the I.C.C. found the so-called DT&I gateway and routing conditions have "no relevance" after merger between MoPac and C&EI, the Court of Appeals ruled that the shippers had not shown sufficient anti-competitive injury related to indirect benefits of the conditions, and that the abandonment will not have an anti-competitive effect violative of the conditions. (App. A, 9a-10a, 34a).

There is thus complete confusion as to the status of the DT&I protective conditions imposed in a railroad merger when the merged carrier later seeks to abandon a former main line which served as an integral part of a through route and channel of trade.

The I.C.C. recently has criticized the DT&I conditions. *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 784, 951 (1980), aff'd *Missouri-Kansas-Texas R. Co.* v. *United States*, 632 F. 2d 392 (5th Cir. 1980), cert. den. 49 U.S.L.W. 3882; *CSX Corp.-Control-Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 577 (1980); *Railroad Consolidation Procedures*, 363 I.C.C. 784, 792 (1981).

But the I.C.C.'s change in policy concerning the DT&I conditions must be done with fairness to all concerned.

The U.S. Court of Appeals for the 4th Circuit recently remanded on this score. *Norfolk & W.R. Co.-Control-Detroit, T. & I.R. Co.*, 360 I.C.C. 498, 526-27 (1979), remanded, *Norfolk & W. Ry. Co.* v. *United States*, 639 F.2d 1096, 1099-1100 (4th Cir. 1981).

Here, MoPac promised shippers and communities in southern Illinois improved service over the former C&EI main line with a "Fayville Connection" between MoPac and C&EI, in a hotly-contested battle for control against Illinois Central. Then MoPac moved from control to merger, promising no substantial routing changes.

But now the I.C.C. rules that the route and channel of trade conditions imposed in the *Control* case did not survive the *Merger* case, as the gateways became internal MoPac points. Thus the asserted benefits of the *Control* were wiped out by *Merger*. (App. D, 34a-35a)

The I.C.C. in approving the Penn-Central merger adopted the recommendations of its ALJ that the I.C.C. will consider as a factor in any abandonment proceeding the assurances given that no abandonment would result. *Pennsylvania R. Co.-Merger-New York Central R. Co.*, 327 I.C.C. 475, 677-78, 810-11 (1966).

The DT&I conditions are for the benefit of shippers as well as for competing railroads. The first five DT&I conditions govern relations with railroads and shippers. *Kansas City Southern Railway Company* v. *United States*, 288 F. Supp. 742, 746 (W.D. Mo. 1968).

The Court of Appeals erred in imposing a burden upon the public in the abandonment case to show anti-competitive injury from cancellation of the traffic conditions as a result of an abandonment vis-a-vis the indirect benefits of the conditions, and that abandonment will not

have an anti-competitive effect. The fact is that the shippers will suffer net losses from the abandonment, and this is conceded by the I.C.C. in its report. (App. D, 35a-36a). The test established by the Court of Appeals for evaluating the DT&I conditions in the context of an abandonment case are unworkable as a practical matter. Rather, the avenue for relief should be for the carrier to first petition for modification of the DT&I condition as imposed in a particular proceeding for a particular situation. Indeed, the DT&I conditions specifically provide for modification on petition. 327 I.C.C. at 386.

II. THE COURT ERRED IN NOT SETTING ASIDE THE ABANDONMENT APPROVAL WHEN ILLINOIS CENTRAL GULF PLACED ITS NEIGHBORING LINE ON ITS SYSTEM DIAGRAM MAP.

The requirement that a railroad list those lines for which it anticipates filing an abandonment application within three years stems from the provisions of 49 U.S.C. 10904(e)(2)(B), which states that a railroad must identify each line for which it plans to file an application, *supra,* 2-3).

Although Division 1 of the I.C.C. relied upon the fact that ICG had not placed its Tamms/Cairo line on its abandonment System Diagram Map in finding Tammsco would have adequate alternate service, 354 I.C.C. at 795 (App. F, 51a), when ICG did in fact list the line, the I.C.C. took no account of the fact. (App. E, 42a).

The Court of Apeals errs in sustaining the I.C.C.'s ruling that every abandonment case must be decided on its own merits. Congress has legislated the System Diagram Map requirement so that the availability of alternate service can be evaluated. The I.C.C. and the Court of Appeals have simply nullified one of the mandated public protections.

CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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December, 1981

APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-1710 & 80-1908

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, PULASKI COUNTY, ALEXANDER COUNTY, PERKS GRAIN COMPANY, C. L. CASPER, and JOHN W. MCGINNESS,

Petitioners,

CAIRO CHAMBER OF COMMERCE, the SOUTHERN ILLINOIS TRANSPORTATION ASSOCIATION, and THE CITY OF CAIRO,

Intervenors,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervenor-Respondent.

Petition for Review of an Order of the Interstate Commerce Commission.

ARGUED JUNE 1, 1981—DECIDED OCTOBER 5, 1981

Before SPRECHER and CUDAHY, *Circuit Judges* and EAST, *Senior District Judge.**

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* The Honorable William J. East, Senior District Judge for the District of Oregon, is sitting by designation.

CUDAHY, *Circuit Judge.* Petitioners[1] seek review of an I.C.C. Decision permitting the Missouri Pacific Railroad ("MoPac") to abandon 25.7 miles of railroad in southern Illinois. The Administrative Law Judge ("ALJ") initially denied the abandonment application.[2] A panel of the I.C.C. disagreed and issued a Report and Order approving the abandonment.[3] On appeal by way of a petition to review the I.C.C.'s order, this court permitted a voluntary remand to the full I.C.C. for further consideration. The subsequent Decision of the full Commission,[4] which also approved the abandonment, is now before this court for review of: 1) Whether the I.C.C. erred as a matter of law about the effect on the abandonment of certain prior conditions imposed by the I.C.C. incident to a prior MoPac merger, 2) Whether the I.C.C. findings of fact are supported by substantial evidence, and 3) Whether this court has jurisdiction to review an I.C.C. decision to withhold certain documents under the Freedom of Information Act. For the reasons stated below, we deny the petition challenging the I.C.C.'s decision of April 21, 1980.

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[1] Petitioners are the People of the State of Illinois, Illinois Commerce Commission, Pulaski County, Alexander County, Tammsco, Inc., Perks Grain Company, C.L. Casper (a private citizen), and John W. McGinness (for the United Transportation Union). The City of Cairo, Cairo Chamber of Commerce and Southern Illinois Transportation Association are intervening petitioners. Respondents are the Interstate Commerce Commission and the United States of America. Missouri Pacific Railroad is an intervening respondent.

[2] I.C.C. Docket No. AB-11, *Chicago and Eastern Illinois Railroad Company Abandonment*, (Initial Decision, October 26, 1973) (unpublished).

[3] I.C.C. Docket No. AB-11, *Chicago and Eastern Illinois Railroad Company Abandonment*, (Report and Order, March 24, 1978) 354 I.C.C. 789 (1978).

[4] I.C.C. Docket No. AB-11, *Chicago and Eastern Illinois Railroad Company Abandonment*, (Decision, April 21, 1980) (unpublished).

I. *Facts*

In 1967, a hotly contested battle for stock ownership of the Chicago & Eastern Railroad ("Eastern") was resolved when the Supreme Court upheld the I.C.C.'s award of conditional purchase authority to MoPac rather than to the competing Illinois Central Gulf Railroad ("IC") in the "*Control* case".[5] Shortly thereafter, Eastern acquired trackage rights over a MoPac line, permitting through traffic to be routed around the 25.7 miles of track at issue in this case. In 1972, Eastern filed to abandon this track but the hearing was enjoined until the I.C.C. could include an environmental impact study in its deliberations.[6] Due to the staleness of the record, a *de novo* hearing was scheduled for June 3, 1976. Eastern petitioned for reconsideration, arguing that the

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[5] *Illinois Central R.R. v. United States*, 385 U.S. 457 (1966). The conditions imposed by the I.C.C. are known as DT&I conditions—so called because their origin is traced to *Detroit, Toledo and Ironton R.R.*, 275 I.C.C. 455 (1950). Particularly at issue are the following:

> 1. Under control of Missouri Pacific, Eastern shall maintain and keep open all routes and channels of trade via existing junctions and gateways, unless and until otherwise authorized by the Commission.
>
> 2. The present neutrality of handling traffic inbound and outbound and in overhead service by Eastern shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of Eastern without discrimination in the arrangements of schedules or otherwise.

Missouri Pac. R.R.—Control—Chicago & E.I.R.R., 327 I.C.C. 279 (1965), *petition for review denied, Illinois Central R.R. v. United States*, 263 F. Supp. 421 (N.D. Ill. 1966) (three-judge court), *aff'd*, 385 U.S. 457 (1967). These conditions have been uniformly imposed on railroad control and merger cases until recently. *See Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 404 (5th Cir. 1980).

[6] The environmental evaluation was required under section 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq. See Harlem Valley Transportation Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd*, 500 F.2d 328 (2d Cir. 1974).

record was adequate to dispose of the issues. The I.C.C. granted the petition, cancelled the *de novo* hearing, and, on April 21, 1976, released the ALJ's Initial Decision denying the abandonment.[7]

The Initial Decision suggested that the decline in rail traffic on the line was at least partially attributable to Eastern's shortage of railroad equipment. Further, rerouting traffic over the MoPac line was found to have contributed to the financial losses on the line. Finally, the ALJ held that the I.C.C.-imposed conditions in the *Control* case conflicted with the proposed abandonment.

Eastern filed exceptions to the adverse decision, and the I.C.C. reopened the proceeding under a modified procedure whereby written evidence is submitted to update the record. Shortly thereafter, Eastern was merged into MoPac,[8] and the relevant conditions imposed in the *Control* case were continued.[9] After the I.C.C. reopened the abandonment proceeding, MoPac was substituted for Eastern as the petitioner. On March 24, 1978, an I.C.C. panel released its Report and Order.

The Report and Order approved the 25.7 mile abandonment. The I.C.C. panel found that the railroad was sustaining losses in providing service over the line and that traffic was declining. Further, the panel found that appellant Tammsco, Inc., the largest shipper along the line, could find alternate rail service. Finally, the I.C.C. stated:

> We turn now to the two factors the Administrative Law Judge found decisive. Neither supports a denial of the abandonment application. First, there is no basis for the assumption that, if additional equipment were available, the line would generate substantially more traffic. Secondly, our approval of

[7] Interestingly, the court-ordered environmental impact statement was completed by the I.C.C. in 1976, but ALJ Thomas Callanan, who wrote the Initial Decision, died in 1974.

[8] *MoPac—Merger—T&P and C&EI*, 348 I.C.C. 414 (1976) ("*Merger* case").

[9] *Id.* at 415-16.

> the MoPac-C&EI merger, without specific routing conditions, served to eliminate the two restrictions which the Administrative Law Judge felt had been violated.

354 I.C.C. at 796. The Report and Order of March 24, 1978, concluded that the adverse effect on shippers did not outweigh the carrier's burden, and therefore, that the abandonment of the 25.7 mile line should be granted. After petitions for administrative review were denied, an appeal to this court was terminated by a voluntary remand to the I.C.C. to correct material error and receive further evidence.

A divided Commission again approved the abandonment in the April 21, 1980, Decision of the full I.C.C. The carrier's losses were recalculated under a new accounting procedure. The potential for future increases in traffic from petitioner-appellant Tammsco, Inc. was also considered and found to be too speculative "to support the conclusion that there is a reasonable likelihood of future traffic increases eliminating the existing operating deficit being incurred by the line."[10] Finally, with regard to the merger conditions, the I.C.C. explained:

> We have considered the parties' arguments regarding the effect of the traffic conditions imposed in the *Merger* case and conclude that those conditions have no relevance to the issues in this proceeding. The traffic conditions imposed in the *Merger* case (known as standard DT&I conditions) are designed to protect the interests of connecting railroads. These conditions require that gateways and junctions with connecting lines be kept open and that neutrality of handling inbound and outbound traffic be observed. These conditions do not apply to a railroad's routing of traffic over its own lines through its internal gateways. Use of an alternate route for bridge [or through] traffic is a matter of managerial discretion. *Missouri Pac R. Co. Abandonment*, 324 I.C.C. 357, 366 (1965). Further, continued oper-

[10] I.C.C. Decision at 9.

> ation of a line should not be required merely because of bridge traffic that can be handled as expeditiously over another route. *Gainesville Midland R. Co. Abandonment*, 267 I.C.C. 256, 262 (1947).
>
> At the time the traffic conditions were originally imposed in the Control case, the involved C&EI line connected with MoPac and connected with ICG at Tamms. In 1975, ICG discontinued the interchange at Tamms. After approval of the MoPac-CE&I merger in the *Merger* case, the MoPac-CE&I gateways became MoPac internal gateways. Therefore, although the *Merger* case continued to impose the standard DT&I conditions, these conditions are not relevant to operations over the abandonment segment because alternate MoPac routes are available which can handle bridge traffic with equal or greater efficiency and economy. MoPac's decision in late 1976, to start routing bridge traffic over other MoPac routes was a proper exercise of managerial discretion and did not violate the traffic conditions.

I.C.C. Decision at 9-10.

Since the I.C.C. Decision, a petition to reopen the abandonment was denied in 1980. A petition for review by this court was filed and the matter argued on June 1, 1981. After briefing, but prior to the argument, petitioners filed a motion to have the I.C.C. reopen the proceedings in light of further developments. The I.C.C. refused to reopen the abandonment proceedings on July 24, 1981.

II. *Conditions*

Petitioners contend that conditions created in the *Control* case, and continued in the *Merger* case, prohibit abandonment "as a matter of law." Of particular concern are the two conditions on which the ALJ relied in his Initial Decision. The first such condition was that Eastern and MoPac must maintain and keep open all routes via existing junctions and gateways. The second condition required Eastern and MoPac to observe neutrality in handling inbound, outbound and overhead traf-

fic. Essentially, petitioners' argue that a railroad is foreclosed from abandoning a line when it is required to "keep open all routes."[11] Presumably, petitioners would have the I.C.C. institute proceedings to remove the conditions before undertaking any abandonment proceedings.

Respondents note that the ALJ's Initial Decision to this effect was overturned by the full I.C.C. The full I.C.C. concluded in its 1980 Decision that the conditions attached to the merger as contended by petitioners but that they did not have the effect of prohibiting the abandonment.[12] Respondents have adopted the position of the full I.C.C. Decision.

The instant case appears to be the first by a federal court to consider the relationship of an I.C.C.-imposed merger condition to a subsequent abandonment. We conclude that petitioners have misconstrued the purpose of the conditions, and, in so doing, have failed to show that this abandonment is controlled by these conditions.

The specific conditions created by the I.C.C. in the instant case do not *per se* limit or constrain an abandonment. In the instant case and in others, the I.C.C. has construed the scope of the DT&I conditions in such a way as not to automatically preclude a subsequent abandonment. For example, in *Chicago and N.W. Ry.—Purchase—Minneapolis & St. L. Ry.*, 312 I.C.C. 285, 295 (1960), the I.C.C. declined to add a requested condition prohibiting subsequent abandonments, noting: ". . . the merits of any future proposal of such nature [an aban-

[11] Relying on the language of the Initial Decision, petitioners concur in the ALJ's assessment that "[f]rom the record established here, one cannot help but to [sic] conclude that these two mandatory restrictions would have to be ignored if the applications [for abandonment] were granted." Initial Decision at 6-7.

[12] In the Report and Order, the I.C.C. panel had held in 1978 that the conditions created in the *Control* case were extinguished by the *Merger* case. The subsequent interpretation of the conditions by the full I.C.C. reflects, in part, the "material error" that caused the I.C.C. to seek a remand from this court of the initial petition for review.

donment] must be reserved for consideration in a proceeding for which such authority is sought."

The I.C.C.'s position that subsequent abandonment proceedings must be considered on their own merits without regard to prior merger conditions has considerable support in the relevant statutory provisions. The I.C.C. may impose "just and reasonable" conditions before approving a merger between two railroads, when the conditions are necessary to protect the public interest. The statute provides that the commission shall consider at least:

> (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

49 U.S.C. § 5(2)(c) (1976) [recodified at 49 U.S.C. § 11344(b) (1978)]. The DT&I conditions are designed to restrain the kind of anti-competitive commercial conduct that might arise from an acquisition or merger. *Kansas City Southern Ry. v. United States*, 288 F.Supp. 742, 747-48 (W.D. Mo. 1968). In the instant case, the I.C.C.'s intent is evident. The *Control* case itself states that the conditions "will provide just and reasonable limitations upon the ability of Missouri Pacific and Eastern to favor selected routes and gateways or to vary the degree of cooperation with the [intervenor railroads] in regard to schedules, interchanges of freight, or other arrangements." *Control*, 327 I.C.C. at 309. Both here and in general, the I.C.C.'s intention is to restrain anti-competitive conduct.

A decision to allow an abandonment, in contrast, requires an assessment of whether the "public convenience and necessity" permits the abandonment. *See Colorado v. United States*, 271 U.S. 153, 164 (1962). Various criteria are involved in the abandonment decision including, *inter alia*, the potential impact on shippers and the

surrounding community and the costs of continued operations to the railroad. We believe that anti-competitive factors should be considered in approving abandonments. But, although an anti-competitive effect of the type barred by the DT&I conditions may be one factor relevant to the overall abandonment decision, it does not follow that such an effect would necessarily have a sufficient negative impact on public convenience and necessity to require the rejection of an abandonment. The existence of a condition that a railroad must "keep open all routes" does not *per se* prohibit an abandonment.

Nor have the petitioners shown how the abandonment of the 25.7 mile line segment would, under the facts of the instant case, adversely affect the competitive posture of any other carrier. The public notice given for this proposed abandonment has not prompted any other railroad to assert that the abandonment would have anti-competitive consequences in violation of one of the merger conditions.[13] Further there has not been a sufficient showing of anti-competitive injury to the shippers on the 25.7 mile line related to any indirect benefits provided to them by the anti-competitive conditions. Petitioners have adduced no evidence to show that there is an actual conflict between the purpose sought to be achieved by the conditions and the consequences of the abandonment.[14]

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[13] Presumably the IC, which litigated the *Control* case to the Supreme Court, would have the greatest interest in the integrity of the conditions imposed, in part, for its protection. Because the IC declined an opportunity to participate in this proceeding, we question how the 25.7 mile abandonment would have any impact on the protection afforded to the IC by the conditions.

[14] Essentially, we think the I.C.C.'s construction of its own merger conditions is entitled to great weight in a subsequent abandonment proceeding because the I.C.C. imposed the merger conditions in the first instance. Because the I.C.C.'s construction of the conditions does not prohibit the abandonment in question, we do not need to consider whether, in general, a condition can be created which would limit MoPac's right to proceed under the abandonment statutes.

We therefore think that the I.C.C. correctly ruled that the DT&I conditions do not prohibit, as a matter of law, the abandonment of the 25.7 mile segment of MoPac track in question.[15] Further, on the facts before us, we believe that the proposed abandonment will not have an anti-competitive effect violative of the conditions.[16]

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[15] Petitioners have raised several other arguments that are ultimately premised on the assumption that the DT&I conditions preclude this abandonment. For example, it is alleged that a pre-abandonment trackage rights agreement improperly voided the conditions and that abandonment of this "main line" of the predecessor Eastern system is barred by control conditions designed to preserve Eastern's main lines. But these alleged violations of the conditions are insufficient to block this abandonment.

Petitioners have also argued that MoPac and Eastern should not have been able to reroute through traffic off of this line to other MoPac lines under the DT&I conditions. Petitioners claim that the rerouting has improperly skewed all of the financial data relevant to the costs and revenues attributable to the line. The conditions do not pertain to a railroad's neutral managerial decisions as to which internal route will be employed for through traffic. *Missouri Pacific R.R. Abandonment*, 324 I.C.C. 357, 366 (1965).

[16] Petitioners further urge this court "to remand and have the agency's views in light of its ongoing inquiry in *Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings Ex Parte* 282 (Sub. No. 5), 45 F.R. 46461-46464 (July 10, 1980)." Petitioners' Brief at 27-28. Petitioners do not indicate, nor do we understand, how this rulemaking proceeding is relevant to the interpretation of the DT&I conditions in a line abandonment proceeding such as the one before us. Nonetheless, we have reviewed the document produced by that rulemaking, *General Policy Statement for Mergers or Control of at least two Class 1 Railroads*, 46 Fed. Reg. 9113-14 (January 28, 1981), and note that the Commission views its broad authority to impose conditions as "useful in ameliorating the anti-competitive effects of a consolidation." *Id.* at 9114. This view is consistent with our holding in the instant case.

III. *I.C.C. Report*

1. Scope of Review

Petitioners also contend that the I.C.C.'s conclusions are based on findings not supported by substantial evidence. While both parties have principally framed their arguments in terms of the absence or presence of substantial evidence to support the I.C.C.'s findings, this court has recently questioned whether the substantial evidence standard applies to the review of an I.C.C. abandonment decision. *See Illinois v. United States*, Nos. 78-1762, 78-2020 and 78-2043, Slip Op. at 8-11 (7th Cir. Jan. 20, 1981). *See also International Minerals & Chemical Corp. v. I.C.C.*, Nos. 80-2096 and 80-2097, Slip Op. at 5 n.3 (7th Cir. Aug. 3, 1981). These two decisions recognize that the substantial evidence subsection of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(E) (1976), apparently applies when hearings are provided by statute and that the statutes governing railroad abandonments do not require public hearings. *See* 49 U.S.C. § 1a(3) (1976) [49 U.S.C. § 10904(c)(1) (1978)]. The standard of review ultimately employed in *Illinois v. United States* was whether the factual findings of the I.C.C. were arbitrary, capricious or an abuse of discretion, a standard also drawn from the APA. This latter standard appears to apply to agency decisions made without a hearing (frequently informal rulemakings). *See* 5 U.S.C. § 706(2)(A) (1976).

We defer to the use by a panel of this court of the "arbitrary, capricious or abuse of discretion" standard in *Illinois v. United States*, but the distinction between that standard and the substantial evidence test is without practical significance in the case before us. Petitioners challenge the I.C.C. decision on the basis of whether certain findings are unsupported by substantial evidence and are therefore arbitrary.[17] Because any evalua-

[17] Petitioners have not argued, Pet. Reply Brief at 3, that the I.C.C. Decision was arbitrary even in the face of correct factual findings, for example, because there was no rational connection between the findings and the ultimate decision of the

(Footnote continued on following page)

tion of the "arbitrariness" of a factual finding necessitates a review of the sufficiency of the evidence, we concur with what we believe to be the thrust of *Illinois v. United States*, intimating that the question is much more semantic than substantial.

Finally, as to the degree of precision required under the "arbitrary" standard, the Supreme Court stated in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), that a reviewing court must:

> consider whether the decision was based on relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Id. at 416. Because an abandonment application is adjudicative and not legislative in nature, *Illinois* at 11, the agency must clearly address the specific legal and factual issues raised. *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). The I.C.C. must also clearly explain why its decision differed from the decision of the original factfinder, the ALJ. 5 U.S.C. § 557(c) *See NLRB v. P.P.G. Industries, Inc.*, 579 F.2d 1057, 1058 (7th Cir. 1978). Because the ALJ's conclusion was based in part on findings as to the financial burden on the railroad and the impact on shippers, the I.C.C. must explain why it is rejecting the ALJ's conclusions, while accepting his financial findings. *Illinois* at 15.

2. I.C.C. Findings

As previously noted, the I.C.C. is required to determine whether the present or future public convenience or necessity supports the abandonment requested. 49

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[17] *continued*
I.C.C. *Compare Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Mindel v. Civil Service Comm'n.*, 312 F. Supp. 485 (N.D. Cal. 1970).

U.S.C. § 1a(4)(a) (1976) [49 U.S.C. § 10903(a) (1978)]. The I.C.C. must balance the present and prospective need for the line against any burden on interstate commerce. *Colorado v. United States*, 271 U.S. 153, 168 (1926). The burden of proof is on the applicant railroad. 49 U.S.C. § 1a(3) (1976) [49 U.S.C. § 10904(b) (1978)].

Petitioners ask this court to review the I.C.C. findings that the 25.7 mile line has been operating and will continue to operate at a loss. The first challenge to these findings is that traffic on the line has not declined, but has been increasing.

> Traffic has steadily declined in recent years, from 454 cars/year in 1970, to 373 in 1972, and 299 in 1977. There is no evidence of expected future traffic increases.

354 I.C.C. at 794. Petitioners point to other traffic figures in the record that suggest an 11-car discrepancy in the 1970 I.C.C. figures. In addition, it appears that, when reciting traffic calculations, the I.C.C. erroneously attributed the 1976 traffic to 1977. But regardless of any minor statistical errors, the line lost about one-quarter of its traffic between 1970 and 1976. Even if petitioners' statistics correctly show that a slight upswing occurred during 1975-1978, the record indicates that from 1970 to 1978 the line traffic declined 22%. Because the errors do not cast substantial doubt on the I.C.C.'s characterization of the traffic on the line as declining, these I.C.C. mistakes represent harmless error. *See Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 606 F.2d 323, 328 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 465 (D.C. Cir. 1967).

Next, petitioners challenge the I.C.C. finding that future increases in traffic are speculative. Of course, this argument would affect the result only insofar as future increases in traffic would erase the operating deficit. The disputed I.C.C. finding is as follows:

> Tammsco has submitted evidence showing that its volume of traffic has been increasing in recent

> years and that it expects these increases to continue if adequate rail service is available. This evidence of future increases in traffic volume is speculative, however, and it is not based on specific negotiations with Tammsco customers. Although Tammsco's traffic may have increased in recent years, the total volume of traffic over the line has been decreasing, as noted in the Division's decision. Further, Tammsco makes no estimate of the revenue that might be derived by MoPac from its anticipated additional traffic. Therefore, we do not believe the record supports a conclusion that there is a reasonable likelihood of future traffic increases eliminating the existing operating deficit being incurred by the line.

I.C.C. Decision at 9. The sort of evidence submitted to rebut this finding is as follows: "[I]t is expected that our growth rate will continue. . . "[18] and "negotiations are under progress that could put our 1978 rail shipments in excess of 20,000 tons."[19] These comments are inconclusive. Hence, the I.C.C.'s finding that the evidence concerning Tammsco traffic increases was speculative and inadequate to eliminate the line's operating deficit is supported by the record.

Third, petitioners challenge the accounting method used by the I.C.C. to determine the unprofitability of the line. The I.C.C. finding in question states: "the evidence shows that the line incurred an avoidable loss of $14,147 in 1977." I.C.C. Decision at 152.

In its Report and Order of March 24, 1978, the I.C.C. had calculated a different avoidable loss figure for 1977. One of the reasons for requesting a remand from this court was to correct the avoidable loss figures used in the 1978 Report and Order.

When the record was reopened, however, MoPac submitted new avoidable loss calculations based upon a new

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[18] Verified statement of John Norton, March 19, 1979.

[19] Verified statement of John Norton, September 6, 1977.

method of computing off-branch costs for 1977. MoPac's new figures reflect increased mileage for traffic originating in the south and terminating on this line. This increase has been caused by MoPac's decision to route through traffic around this line. Traffic from the south must go north of its final destination and then south on this line, now essentially a spur line.

Petitioners contend that MoPac's new figures overstate off-branch costs by $20,000. Petitioners' argument is based upon a projection from the off-branch cost/revenue ratio existing prior to 1977. The projected figures ignore the reality that traffic routing patterns changed in 1977.[20] Through traffic no longer moves over this line. Indeed, such movement would be time-consuming because of speed restrictions on the line.

The I.C.C. explained its adoption of MoPac's cost recalculation as a reliance on actual costs. Because the procedure accounts for the material change in traffic routing, the I.C.C. correctly chose to employ an accounting procedure more firmly anchored in reality.[21] The I.C.C. sufficiently explained the reasons for its accounting procedures, and its findings of fact are supported by the record.[22]

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[20] The rerouting has been upheld earlier in this opinion. *See* note 15 *supra*.

[21] "The earnings capacity of overhead traffic which may be economically handled over other lines of the carrier is of little relevance in abandonment proceedings. See *Seaboard Coast Line R. Co.—Abandonment*, 360 I.C.C. 123, 127 (1974)." I.C.C. Decision at 7.

[22] Intervening petitioners Cairo Chamber of Commerce, the Southern Illinois Transportation Association and the City of Cairo also argue that the I.C.C.'s accounting standards in abandonment proceedings are inadequate: "Assuming the [1977] loss to be $14,147 instead of a profit, then when this loss is compared to . . . [Mopac's total] profit in 1977 . . . the percent of loss is 0.01228 percent." Supplemental Brief for Petitioner-Intervenor at 10. If accepted, this dubious reasoning would prohibit large, profitable railroads from ever abandoning small lines that generate losses. The I.C.C. financial guidelines are adequate in this regard. *See Southern Ry. v. North Carolina*, 376 U.S. 93, 104-05 (1964).

Finally, petitioners dispute the I.C.C. factual finding that the IC can provide adequate alternative service for Tammsco, the largest shipper on the line. The IC maintains service to Tamms, Illinois, and MoPac has offered to give Tammsco a segment of siding that connects with the IC. The I.C.C. found that the IC service did not differ materially from the existing MoPac service although both were infrequent and suffered from a shortage of boxcars. Petitioners first argue that the IC was not providing service until after the record in this proceeding was closed; second, they contend that the IC may soon abandon the line which provides service to Tammsco.[23]

These arguments are not persuasive. The IC commenced service prior to the MoPac abandonment and is serving the line at the present time. Although service did not commence until after the record closed, petitioners do not suggest, nor does it occur to us, what could prohibit the I.C.C. from taking official notice of the later commencement of the service. The fact that the IC may subsequently abandon the line should not be considered in the instant case. The IC is alleged only to have indicated on its system map that an abandonment application *may be filed* within three years. If the IC management ultimately decides to file an application, the I.C.C. is statutorily required to consider the interest of shippers such as Tammsco as part of the determination of whether the public convenience and necessity would permit the IC abandonment. Absent a clear showing why different treatment is required, each abandonment proceeding must be decided on its own merits. *Illinois v. I.C.C.*, 615 F.2d 743, 749 (7th Cir. 1980). Further, if we were to consider every prospective (and presently hypothetical) abandonment as relevant to the one before us, we might never bring any case to a close. *See I.C.C. v. City of Jersey City*, 322 U.S. 503, 514-15 (1944). The findings and conclusions of the I.C.C. regarding the alternative ser-

[23] We have reviewed petitioners' additional memorandum of August 3, 1981, and documents filed to supplement the record on May 26, 1981, on this matter but reject their conclusions for the reasons stated in the text.

vice by the IC are supported by substantial evidence and are not arbitrary.

IV. *Documents*

Petitioners-appellants ask this court to secure certain documents, or to remand this proceeding to require the I.C.C. to provide "the explanatory documents necessary to its decision." Petitioners' Brief at 28.[24] Petitioners' request for the documents was denied by the I.C.C. Information/Privacy Officer, and, on appeal, by the Chairman of the I.C.C. The request was made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1976), and not pursuant to discovery. Although the request included the notation "Re: Docket No. AB-11," the procedure was unmistakably that of the FOIA.[25] Because petitioners have employed a separate proceeding to obtain these documents, the issue is not for our review. Appeal from an agency denial of a FOIA request should be raised in the district court for *de novo* review. 5 U.S.C. § 552(a)(4)(B) (1976).

V. *Conclusion*

We have carefully considered all other issues raised by this appeal and find them to be without merit. Accordingly, we deny the petition challenging the I.C.C.'s order of April 21, 1980 granting abandonment with respect to the 25.7 miles of track.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[24] These documents include a draft decision, written views of General Counsel, a memo rejecting the decision, a revised decision, further written views of General Counsel, and a memo rejecting the revised edition.

[25] Petitioners' Brief at 27A.

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APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
November 3, 1981

Before: Hon. Robert A. Sprecher, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. William J. East Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, PULASKI COUNTY, ALEXANDER COUNTY, TAMMSCO, INC., PERKS GRAIN COMPANY, C.L. CASPER AND JOHN W. McGINNESS.	)	
Petitioners	)	**Petition for Review**
vs.	)	**of an Order of the**
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,	)	**Interstate Commerce Commission.**
Respondents.	)	

Nos. 78-1710 & 80-1908

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by petitioners, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable William J. East, Senior District Judge for the District of Oregon, is sitting by designation.

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
November 27, 1981

Before: Hon. Richard D. Cudahy, Circuit Judge

Nos. 78-1710 & 80-1908

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, PULASKI COUNTY, ALEXANDER COUNTY, PERKS GRAIN COMPANY, C.L. CASPER AND JOHN W. McGINNESS. *Petitioners*	**Petition for Review of an Order of the Interstate Commerce Commission.**
CAIRO CHAMBER OF COMMERCE the SOUTHERN ILLINOIS TRANSPORTATION ASSOCIATION, and the CITY OF CAIRO, *Intervenors*	
vs.	
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Respondents.*	
MISSOURI PACIFIC RAILROAD COMPANY *Intervening-Respondent.*	

On consideration of the "MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI TO U.S. SUPREME COURT" filed herein on November 9, 1981 by counsel for the petitioner.

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is hereby STAYED to and including December 10, 1981, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-11[1]

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY ABANDONMENT BETWEEN JOPPA JUNCTION AND FAYVILLE JUNCTION, IL[2]

Decided: April 21, 1980

By application filed November 27, 1972, by Chicago & Eastern Illinois Railroad Company (C&EI), predecessor in interest to Missouri Pacific Railroad Company (MoPac), MoPac seeks authority under 49 U.S.C. § 10903 to abandon its line between Joppa Junction and Fayville Junction, a distance of approximately 25.7 miles, in Johnson, Pulaski, and Alexander Counties, IL.

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[1]This proceeding originally embraced dockets No. AB-11 (Sub.-No. 1) and No. AB-11 (Sub.-No. 2), which were related applications for discontinuance of trackage rights. These applications were subsequently withdrawn by Chicago & Eastern Illinois Railroad Company.

[2]The Chicago & Eastern Illinois Railroad Company has been merged into the Missouri Pacific Railroad Company pursuant to Commission authorization in *MoPac-Merger-T&P and C&EI*, 348 I.C.C. 414 (1976), modified at 559 F.2d 408 (1977). Division 1, by decision served March 29, 1978, granted Missouri Pacific Railroad Company's petition to be substituted as applicant in this proceeding.

The application was the subject of oral hearings in 1973, but issuance of the initial decision was delayed until 1976, pending an environmental review. The initial decision recommended denial of the application. On exceptions filed by C&EI, Division 1 reversed the initial decision and authorized the proposed abandonment, by decision served March 27, 1978, printed at 354 I.C.C. 789 (1978).

After the filing of an action in the United States Court of Appeals for the Seventh Circuit seeking judicial review of the decision of Division 1, the Commission, with the Court's approval, reopened this proceeding. By decision served December 26, 1978, the Commission set the proceeding for further hearing, under the modified procedure, to receive additional evidence with respect to (a) revenues from bridge traffic; (b) possible increases in traffic; (c) the effect of traffic conditions; and (d) the financial condition of the abandoning railroad.

MoPac has submitted further evidence as requested. Replies and further evidence were filed separately by protestant Tammsco, Inc., and by intervenor Edward C. Spatz, and jointly by protestants Perks Grain Company, C. L. Gasper, John W. McGinness (on behalf of the United Transportation Union), and various Illinois governmental entities.

PROCEDURAL MATTERS

After the time had passed for the filing of their statements, but before the filing of MoPac's rebuttal, joint protestants petitioned for leave to file a supplemental verified statement correcting the statement of James L. Morland, offering new evidence regarding certain detour operations conducted on March 23 and 24, 1979 over the line to be abandoned and supplying an appropriate

verification for both statements. Applicant filed a reply to this petition 2 days after filing its rebuttal statement. Although it objects to the additional evidence as being irrelevant, it submits a supplemental verified statement asserting that the trains operated over the line to be abandoned for 2 days only because the line normally used was flooded. Applicant states that this flooding last happened in 1973. The acceptance of protestants' supplemental verified statement and MoPac's reply will neither delay this proceeding nor prejudice the rights of any party. This evidence has some relevance to this proceeding and will be accepted.

Joint protestants have also filed a motion to strike certain portions of MoPac's verified rebuttal statement. They object to (1) Mr. Bowman's testimony concerning the number of locomotives operated over the line and his use of conductor's time records to establish this point, (2) the "new" testimony concerning apportionment of the Joppa station agent time, (3) a "restatement" of protestants' position, and (4) a conclusion that even if all of protestants' allegations were true, the line would still be unprofitable.

We recognize that the rebuttal testimony of Mr. Bowman directly contradicts his prior statement dated August 23, 1977, where he stated that only one locomotive operated over the line. We hesitate to accept as probative his testimony as to how much of the station agent's salary should be apportioned to the line in question without some basis for this conclusion.

These matters go to the weight to be accorded this evidence, rather than to its admissibility in rebuttal. Because the evidence challenged in parts (1) and (2) of joint protestants' motion to strike is properly submitted on rebuttal, we will not strike it from the record. For the

reasons stated above, however, we do not believe this evidence is entitled to any weight in our decision. The other two items objected to by joint protestants are permissible argument, not evidence, and will be considered as such. The motion to strike, therefore, will be denied in all respects.

EVIDENCE ON FURTHER HEARING

Bridge traffic/avoidable evidence

Division 1, in its prior decision in this proceeding, concluded that the line proposed to be abandoned incurred avoidable losses of $61,922 during 1975, $29,256 during 1976, and $12,217 during the first three months of 1977. In the calculation of these losses, no bridge traffic revenues were attributed to the line. Because bridge traffic undisputedly had moved over the line prior to 1977, and possibly had move over the line in 1977, these figures were in error to some undisclosed degree. Therefore, we requested the submission of additional evidence disclosing what bridge traffic has moved over the line and what the avoidable losses for the line have been given consideration to bridge traffic revenues.

MoPac has submitted evidence of the bridge traffic moving over the line during 1974, 1975, and 1976. It asserts that it has not been able to develop this information for 1973 and that no bridge traffic moved over the line in 1977. This evidence shows that applicant's revenues from bridge traffic which has moved over the line totalled $109,780 in 1974, $32,866 in 1975, and $73,065 in 1976. These figures represent the revenues received for applicant's entire portion of the bridge traffic movements, not the prorated share of revenues with respect to the part of the movement over the abandonment segment.

MoPac has submitted three sets of figures showing the avoidable losses incurred by the abandonment segment from 1973 through 1977. These figures differ with respect to the method used in attributing bridge traffic revenues and costs to the abandonment segment.

The first set of figures does not attribute any bridge traffic revenues to the line. MoPac agrues that bridge traffic which formerly moved over the abandonment segment can as easily move over other MoPac lines (and, in fact, now moves over these other lines). It contends, therefore, that bridge traffic revenues need not be considered in calculating the line's avoidable loss because bridge traffic will continue to move over MoPac lines even if the abandonment should be allowed. These avoidable loss figures are the same as those previously considered by Division I, except that MoPac has now presented full-year loss figures for 1977, which show an avoidable loss of $42,430.

MoPac's second set of figures shows avoidable losses for the abandonment segment with bridge traffic revenues attributed to the line in accordance with the prorating method prescribed by Commission regulations, 49 C.F.R. 1121.41. These figures show avoidable losses for the abandonment segment of $42,946 in 1973, $43,916 in 1974, $58,935 in 1975, $23,713 in 1976, and $42,430 in 1977.

MoPac's third set of figures uses a "before and after" approach to bridge traffic revenues and costs. Under this approach, MoPac has given consideration to the actual changes in revenues and costs that would occur if the segment of line were abandoned and bridge traffic rerouted over other MoPac lines to the extent feasible. These calculations produce avoidable loss figure of $67,083 in 1973, $63,796 in 1974, $36,377 in 1975, and $42,430 in 1977.

Joint protestants have submitted evidence and arguments challenging the accuracy of MoPac's avoidable loss calculations. They contend that MoPac overstated its off-branch costs for 1977. They assert that MoPac's costs averaged about 60 percent of revenues from 1973 through 1976. For 1977, however, MoPac changed its method of computing off-branch costs. This change greatly increased off-branch mileage and raised off-branch costs to approximately 75 percent of revenues. Protestants assert MoPac's off-branch costs would be reduced by $20,000 if adjusted to 60 percent of revenues.

Joint protestants contend that the 1977 on-branch costs are overstated also. They assert that locomotive costs are overstated by $4,000 and fuel costs are overstated by $7,000. They contend that these costs are overstated because MoPac calculated the costs on the basis of 2.63 locomotives operating over the line, rather than one unit, and because of the use of excessive on-branch miles of operation figures. They also argue that car costs are probably overstated by $1,000. Protestants also agrue that the Joppa station employee cost of $16,257 should be disallowed entirely. The asserted off-branch and on-branch cost overstatements for 1977, total $48,257. If these adjustments to MoPac's costs were all made, then the line to be abandoned would have made a profit of $5,827 in 1977, rather than having incurred an avoidable loss of $42,430.

MoPac has submitted evidence in rebuttal to joint protestants' challenges to its cost evidence. MoPac states that it did use a method to compute off-branch mileage in costs for 1977 which differed from the method used for 1976. It asserts, however, that the method used for 1977 is based on actual off-branch mileage, whereas the 1976 method was based on the shortest available MoPac routes, regardless of whether the involved traffic actually moved

over those routes. Thus, MoPac asserts that the off-branch costs for 1976, were understated and the figures for 1977 more accurately reflect actual off-branch costs.

MoPac asserts that it correctly calculated on-branch locomotive and fuel costs on the basis of 2.63 units operating over the line, but concedes some overstatements with respect to mileage. MoPac states that it should not have charged the Joppa agent's cost entirely to the abandonment line. It asserts that half of the cost should be allocated to that line. Protestants contend, however, that even a 50 percent allocation would be excessive.

Joint protestants assert that MoPac's bridge traffic evidence contains errors by misstating the point where the MoPac line connects with the line which includes the abandonment segment and by omitting one bridge movement over the abandonment segment in January 1977. MoPac asserts that the connection point location was a minor misstatement. The misstatement does not appear to have had any bearing on MoPac's cost evidence. MoPac states that the bridge traffic revenue to be apportioned to the abandonment segment from the one movement in January 1977, would be $26.

Increased traffic evidence

The prior decision of Division 1 stated that the record contains no evidence of future traffic increases. It appears, however, that the major shipper on the line, Tammsco, Inc., projects future increases in its rail traffic. Therefore, we requested the submission of additional evidence regarding future increases in traffic, particularly that of Tammsco, that may be expected to move over the line.

Tammsco has submitted a verified statement containing evidence of its traffic volume and of possible increases in

volume. Tammsco mines and processes silica at Tamms, IL. Its traffic has been increasing in recent years and it expects the increase in traffic volume to continue. In 1977, its traffic was up to 20 percent over the previous year and in 1978, its traffic increased 17 percent over the 1977 level. Tammsco asserts that its volume for 1978, would have been even higher if it had been able to obtain more rail equipment to handle its shipments. Based on its established rate of traffic volume increase, Tammsco anticipated having a rail volume of 16,000 tons for 1979. As of March 1, 1979, Tammsco had 25 carload orders backed up waiting for boxcars to become available. Further, Tammsco asserts that the boxcar shortage forced it to shut down its facilities from January 27 through February 4, 1979. MoPac asserts that the shortage of boxcars is a continuing problem and that its inability to supply Tammsco with as much equipment as requested is not unique to that shipper. Although Tammsco may be able to obtain service from the Illinois Central Gulf Railroad Company (ICG) if the abandonment is authorized, it does not believe that ICG will be able to meet its needs for transportation service.

Effect of traffic conditions

In his initial decision in this proceeding, the Administrative Law Judge concluded that a major cause of the operating losses incurred by the abandonment segment was the decision by MoPac to route bridge traffic over other lines, thus depriving the segment sought to be abandoned of bridge traffic revenues. The Judge concluded that this routing decision by MoPac violated traffic conditions imposed by the Commission's decision in *Missouri Pac.-Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279, 323 (1965) (The *Control* case).

Division 1, in its decision, concluded that the involved traffic conditions were not included in the Commissions' decisions in *MoPac-Merger-T&P and C&EI,* 348 *Merger* case), and, therefore, have been eliminated. The *Merger* case did, however, impose the traffic conditions and the Division's contrary conclusion was incorrect. We have, therefore, requested and received comments by the parties regarding the relevance of these conditions to this proceeding. These comments are argument rather than evidence and will be considered in the discussion and conclusions in this decision.

MoPac's financial condition

As previously noted, MoPac was substituted for C&EI as applicant in this proceeding. Because MoPac was not a party before Division 1 issued its decision approving the substitution, the record contained no evidence regarding MoPac's financial status.

MoPac has not submitted evidence of its financial condition. It suggests, however, that we take official notice of its financial condition as reflected in its annual reports to the Commission. It also suggests that we take official notice of its balance sheet and income statements filed in another proceeding, Finance Docket No. 28933F, *Missouri Pacific Railroad Company Trackage Rights Over Union Pacific Railroad Company, Omaha, NE.* MoPac argues, however, that evidence of its financial condition is not necessary to the disposition of this proceeding because the Commission may conclude that an unprofitable branch line is a burden on interstate commerce, notwithstanding the prosperity of carrier's entire system.

We will take official notice of MoPac's most recent annual report on file with this Commission. Official notice

may be taken of matters contained in reports filed with the Commission, provided that any party, on timely request, shall be given an opportunity to show the contrary. *Norfolk & W. Ry. Co. and New York, C.&St.L.R. Co. Merger,* 324 I.C.C. 1, 10 (1964) and 5 U.S.C. § 556(e). MoPac's annual report for 1978, reveals that it received $202,969,000 in operating income. Its net railway income for the year was $135,676,000. The annual report shows MoPac to be financially healthy and to be operating profitably.

We will not take official notice of the financial evidence filed by MoPac in Finance Docket No. 28933F. That evidence is not more recent than the financial information contained in MoPac's 1978 report to the Commission. Further, to the extent that the evidence in that proceeding differs from the financial information in MoPac's 1978 report to the Commission, it has not been shown to be more accurate in representing MoPac's financial condition.

Any party seeking to submit evidence with respect to MoPac's financial condition which contradicts the financial data contained in MoPac's 1978 annual report to the Commission shall submit a petition to reopen the record for the receipt of new evidence, in accordance with the provisions of 49 CFR 1100.98(h). A petition offering new evidence contradicting the matters given official notice must be filed within 30 days after the date of service of this decision. The filing of such a petition will not stay the effective date of this decision, since this decision will become effective on its service date.

DISCUSSION AND CONCLUSIONS

In considering an abandonment application, we must weigh the burden on the railroad. and on interstate commerce, of continued operations against the burden that loss of rail service would place on shippers and the community, as a whole. Division 1, in its prior decision in this proceeding, concluded that the respective burdens weigh more heavily on the railroad and on interstate commerce, and found that the abandonment would be consistent with the public convenience and necessity. Our analysis of the record, including the further evidence and arguments which have been submitted, leads us to conclude that the ultimate conclusions and findings by the Division were correct and that the further evidence and arguments do not warrant our reaching a contrary result.

The bridge traffic and operating loss evidence show that the avoidable losses attributable to the abandonment segment are lower than the Division's prior decision stated. The record does, however, show the line to be operating unprofitably. MoPac has submitted three sets of avoidable loss figures for the line, differing with respect to the treatment of bridge traffic revenues. We will give consideration to MoPac's set of figures which shows the actual changes in revenues and costs that would occur if bridge traffic were rerouted over other MoPac lines. The earnings capacity of overhead traffic which may be economically handled over other lines of the carrier is of little relevance in abandonment proceedings. See *Seabord Coast Line R. Co. - Abandonment,* 360 I.C.C. 123, 127 (1979). We note, however, that virtually no bridge traffic has moved over the line since the end of 1976. The avoidable loss figures for the line for 1977, therefore, are the same under all three methods of calculation.

MoPac's evidence shows an avoidable loss of $42,430 incurred by the line in 1977. Joint protestants contend, however, that MoPac has overstated costs by $48,257 and that the line is operating profitably. Protests assert that MoPac has overstated off-branch costs, locomotive and fuel costs, car costs, and employee costs.

Protestants argue that MoPac overstated off-branch costs for 1977 by $20,000. They contend that MoPac changed its method of calculating off-branch costs in 1977, and that this change significantly increased off-branch costs as a portion of revenues. Protestants state that a $20,000 reduction in off-branch costs would reduce these costs in proportion to revenues to about the level of prior years. MoPac concedes that it did change its method of calculating off-branch costs. It states, however, that the method used for 1977 more accurately reflects actual off-branch costs. The 1977 method is based on actual off-branch miles of operation, not shortest possible off-branch mileage for bridge traffic. Protestants have not submitted evidence showing that off-branch costs have been overstated. Their arguments are based on projections of cost/revenue ratios from prior years. MoPac has explained adequately the reason for its change in off-branch cost calculations. We conclude, therefore, that MoPac has not overstated its off-branch costs for 1977. Rather, it appears that off-branch costs were understated somewhat in prior years.

Joint protestants contend that MoPac overstated locomotive and fuel costs by a total of $11,000 for 1977. They contend that MoPac erred by basing these costs on an average of 2.63 power units operating over the line and by overstating miles of operation. MoPac argues that an average of 2.63 power units did in fact operate over the line. It admits, however, some overstatement in miles of

operation. As discussed with respect to protestants' motion to strike, we decline to give weight to MoPac's cost evidence relating to operation of 2.63 power units over the line. The evidence of more than one power unit operating over the line is somewhat contradictory and ambiguous. The carrier has the burden of proving its avoidable losses from operating a line to be abandoned. We do not believe that MoPac has met this burden with respect to the disputed $11,000 in locomotive and fuel costs.

Protestants contend that MoPac has overstated on-branch car costs by $1,000. MoPac asserts that these costs increased as a result of longer detention times on the line because of less frequent service. It concedes that on-branch mileage was somewhat overstated. We believe that MoPac's argument that detention time has increased because of the reduction in service frequency is reasonable. However, we do not believe that MoPac has adequately explained its basis for its calculation of the amount of the increase in car costs as a result of the service reduction. Therefore, we conclude that MoPac has not met its burden of proof with respect to the disputed $1,000 in car costs.

Protestants assert that the $16,257 employee cost for the Joppa agent should not have been charged to the abandonment segment. MoPac admits that the full amount of this cost should not have been charged to the involved line, but contends that 50 percent of the cost is properly chargeable to the line. Protestants have submitted reply evidence that a 50 percent cost allocation to the line would be excessive. We agree with protestants that MoPac has failed to prove the extent to which the Joppa agent employee expense would be avoidable. MoPac's 50 percent allocation assertion is not based on any reasonably probative evidence, as we noted in our discussion of protestants' motion to strike.

The cost figures for the involved line for 1977 which have not been adequately substantiated by MoPac total $28,257. After adjusting MoPac's avoidable loss calculations by this amount and by the additional $26 in revenues for bridge traffic which protestants argue should be included, the evidence shows that the line incurred an avoidable loss of $14,147 in 1977.

Tammsco has submitted evidence showing that its volume of traffic has been increasing in recent years and that it expects these increases to continue if adequate rail service is available. This evidence of future increases in traffic volume is speculative, however, and is not based on specific negotiations with Tammsco customers. Although Tammsco's traffic may have increased in recent years, the total volume of traffic over the line has been decreasing, as noted in the Division's decision. Further, Tammsco makes no estimate of the revenue that might be derived by MoPac from its anticipated additional traffic. Therefore, we do not believe the record supports a conclusion that there is a reasonable likelihood of future traffic increases eliminating the existing operating deficit being incurred by the line.

Tammsco states that it does not believe that ICG can provide adequate rail service to meet its needs if MoPac abandons its line. Tammsco has presented no evidence of any deficiencies in the service available from ICG other than a statement that ICG has expressed pessimism over its ability to meet Tammsco's needs. We conclude that Division 1 correctly found that adequate alternative rail service is available to Tammsco. Although ICG may experience that same shortages of boxcars as has MoPac in serving Tammsco, the record does not shows that ICG service would differ materially from MoPac service. Therefore, upon consideration of the evidence, as sup-

plemented on further hearing, we conclude that Tammsco would not be adversely affected by the MoPac abandonment.

We have considered the parties' arguments regarding the effect of the traffic conditions imposed in the *Merger* case and conclude that those conditions have no relevance to the issues in this proceeding. The traffic conditions imposed in the *Merger* case (known as standard DT&I conditions) are designed to protect the interests of connecting railroads. These conditions require that gateways and junctions with connecting lines be kept open and that neutrality of handling inbound and outbound traffic be observed. These conditions do not apply to a railroad's routing of traffic over its own lines through its internal gateways. Use of an alternate route for bridge traffic is a matter of managerial discretion, *Missouri Pac. R. Co. Abandonment,* 324 I.C.C. 357, 366 (1965). Further, continued operation of a line should not be required merely because of bridge traffic that can be handled as expeditiously over another route, *Gainesville Midland R. Co. Abandonment,* 267 I.C.C. 256, 262 (1947).

At the time the traffic conditions were originally imposed in the Control case, the involved C&EI line connected with MoPac and connected with ICG at Tamms. IN 1975, ICG discountinued the interchange at Tamms. After approval of the MoPac-C&EI merger in the *Merger* case, the MoPac-C&EI gateways became MoPac internal gateways. Therefore, although the *Merger* case continued to impose the standard DT&I conditions, these conditions are not relevant to operations over the abandonment segment because alternate MoPac routes are available which can handle bridge traffic with equal or greater efficiency and economy. MoPac's decision in late 1976, to start routing bridge traffic over other MoPac routes was a proper exer-

cise of managerial discretion and did not violate the traffic conditions.

MoPac's most recent annual shows that it is operating profitably and is financially healthy. The continuation of unprofitable operations, however, should not necessarily be required merely because a railroad is financially able to do so. In weighing the relevant interests in an abandonment application proceeding, our primary concern is not to protect the railroad, but to protect interstate commerce, *Colorado v. United States,* 271 U.S. 153, 163 (1926). Although a railroad may be financially capable of operating an unprofitable branch line, such operations divert revenues from the railroad's overall operations and impose some burden on its overall interstate service. A railroad, therefoe, should not be required to continue deficit-producing branch line operations absent a reasonable likelihood that the line will operate profitably in the future, an overriding public need for the operations, or equitable reasons for compelling continued operations.

As previously discussed, we do not believe the evidence shows a reasonable likelihood of future profitable operations over the line. In view of the light volume of traffic over the line, we do not believe that an overriding public need has been shown for continuation of the involved operations. Protestants argue that MoPac has unfairly deprived the line of bridge traffic. As we have noted, however, MoPac's routing decisions with respect to bridge traffic were proper exercises of managerial discretion and do not militate against approval of the abandonment.

It is not an unusual result of most railroad abandonments that some shippers suffer some financial loss. It is well established, however, that such adverse impact upon a few shippers does not warrant requiring continua-

tion of a losing operation, *Illinois Term. R. Co. Abandonment,* 312 I.C.C. 607, 613 (1961). We conclude, therefore, that the proposed abandonment should be allowed and authorized despite MoPac's healthy financial position.

We conclude that the record, as supplemented by the evidence and arguments considered here, supports the findings of Division 1 in its prior decision in this proceeding, except that we will condition the abandonment upon the imposition of the Commission's labor protective conditions applicable at the time the decision of Division 1 became effective. The Commission's labor protective conditions prescribed in decisions served after the effective date of the decision of Division 1 have not been made retroactive and will not be imposed here.

We find:

The public convenience and necessity have been shown to permit the abandonment by the Missouri Pacific Railroad Company of its line between Joppa Junction and Fayville Junction in Johnson, Pulaski, and Alexander Counties, IL, subject to the imposition of the labor conditions prescribed in *Oregon Short Line R. Co.-Abandonment-Goshen* (Oregon II) 354 I.C.C. 584 (1978). This decision does not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. Joint protestants' petition for leave to file a supplemental verified statement is granted. Joint protestants' supplemental verified statement and applicant's reply verified statement thereto are accepted into evidence.

2. Joint protestants' motion to strike parts of applicant's rebuttal presentation is denied in its entirety.

3. The prior decision by Division 1 in this proceeding, served March 29, 1979, printed at 354 I.C.C. 789 (1978), is modified in accordance with our findings on the additional evidence presented here.

4. Any party seeking an opportunity to file a verified statement with respect to the matters of which we have taken official notice, shall file an appropriate petition with this Commission within 30 days of the date of service of this decision.

5. In the event any person or government entity is considering an offer of financial assistance to enable the rail service to be continued, the offeror should comply with 49 C.F.R. 1121.38(b). Within 10 days afater receiving appropriate notification that an offer of financial assistance is being considered, applicant shall comply with the information requirements of 49 C.F.R. 1121.38(e).

6. All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of the subject line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left-hand corner of envelopes containing such correspondence: "Section of Finance, AB-RSCP."

7. Subject to the conditions set forth above, an appropriate certificate of abandonment shall become issued. Applicant shall not effect any abandonment or discontinuance of service prior to the effective date of the certificate of abandonment.

8. This decision will be effective on the date it is served.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis. Vice Chairman Gresham's position on the appropriate level of labor protection is expressed in *Oregon Short Line II*, 354 I.C.C. 584, 597. He otherwise concurs in the majority's decision to grant the abandonment. Commissioner Stafford absent and not participating. Commissioner Clapp dissenting with a separate expression.

(SEAL) Agatha L. Mergenovich
Secretary

COMMISSIONER CLAPP, dissenting:

In my view, applicant has failed to demonstrate that abandonment is justified. The primary reason for permitting such action is that the line is operating at a loss. Yet, the evidence indicates that traffic on the line is increasing and that the amount of avoidable losses is questionable. In the absence of a positive showing of continuing deficits, I believe that the public interest requires that the application be denied.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-11

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY ABANDONMENT BETWEEN JOPPA JUNCTION AND FAYVILLE JUNCTION, IL

Decided: July 21, 1981

On March 18, 1981, a joint petition to reopen this proceeding was filed by the State of Illinois, Illinois Commerce Commission, Tammsco, Inc. and Patrick W. Simmons (protestants). A reply was filed by the substituted applicant, Missouri Pacific Railroad Company (MoPac) on April 3, 1981. After considering the pleadings, we have decided to deny the petition.

BACKGROUND

In November, 1972, the Chicago and Eastern Illinois Rairoad Company (C&EI) filed an application to abandon approximately 26 miles of track between Joppa Junction and Fayville Junction, IL. Although oral hearings were held in 1973, issuance of the initial deicsion was delayed until 1976 pending an environmental review. The initial decision denied the application[1]

[1]The decision also denied two related applications by C&EI to discontinue trackage rights. Those applications, Nos. AB-11 (Sub-No. 1) and (Sub-No. 2), were subsequently withdrawn by C&EI.

Division 1 reversed that decision and authorized abandonment in a decision served March 29, 1978. *See,* 354 I.C.C. 789 (1978). The decision was appealed to the United States Court of Appeals for the 7th Circuit. Believing that the Division's decision might contain material error, we reopened the proceeding, with the 7th Circuit's approval, and received additional evidence.

After reviewing the new evidence we found that the public convenience and necessity permitted abandonment essentially because the burden on MoPac of continuing unprofitable operations with no reasonable likelihood of future profitable operations outweighed the burden on shippers and the affected communities. See decision served May 6, 1980. On August 12, 1980, we denied petitions to reopen the proceeding. An abandonment certificate was issued and became effective on February 18, 1981, a month before the joint petition was filed.

At this time, the case is pending judicial review before the 7th Circuit in Docket Nos. 78-1710 & 80-1908, *People of the State of Illinois* v. *United States.*

PRELIMINARY MATTER

The first issue we must consider is whether we still have jurisdiction to reopen this abandonment. MoPac asserts that our jurisdiction expired when the abandonment certificate became effective. It has cited three cases in support of its position; those cases are not controlling. The first two cases, *Chicago & North Western Transp. Co.* v. *U. S.,* 582 F.2d. 1043 (7th Cir. 1978), and *Chicago and North Western Transp.* v. *U.S.,* 627 F.2d. 94 (7th Cir. 1980), held that under the then existing statute, we could not withhold the issuance of an effective abandonment certificate after the time period for subsidy negotiations had

expired. The third case cited by MoPac, *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), is equally inapplicable because that proceeding involved water carrier certificates which had been in effect for a year and a half and whose authority had been actively exercised by the carrier.

Although a certificate has been issued in this proceeding which has become effective, the carrier has not exercised that authority to abandon the line. Complete abandonment (i.e. consummation) includes cessation of operations, cancellation of tariff, and letter notification to the Commission that abandonment has been finalized. See *Common Carrier Status of States, State Agencies,* 363 I.C.C. 132 (1980). We have not received such notification in this proceeding. When abandonment authority has not been consummated, as here, rail operations remain subject to our jurisdiction, and we may reopen the proceeding. Until consummation the carrier continues to have a common carrier obligation. Moreover, since abandonment certificates are permissive in nature, the carrier has 1 year to decide whether to exercise its authority. Thus, we must assume that rail operations continue until consummation.

Even after abandonment authority is exercised, a reviewing court could order the abandonment proceeding reopened, since it possesses the power to enjoin abandonments not properly authorized by the Commission. See, *Florida E.C. Ry. Co. Petition for Declaratory Order,* 360 I.C.C. 272 (1979). We could also reopen a consummated abandonment (in the instance of fraud, for example).

DISCUSSION AND CONCLUSIONS

Having determined that we have the authority to reopen this proceeding we turn to the merits of protestants' request. Their first argument is that alternate rail service now available to the line's biggest shipper, Tammsco, Inc., may not be available in the future. Illinois Central Gulf Railroad Company (ICG) now provides this alternate service via industrial siding track. However, on February 17, 1981, ICG placed this line in category 1 of its system diagram map, indicating that the line is anticipated to be the subject of an abandonment application within 3 years. Protestants argue that the lack of guaranteed future rail service to Tammsco via ICG trackage undermines the basis for approving the instant abandonment application. We disagree.

ICG's designation of track in Category 1 of its system diagram map does not mean that an abandonment application will even be filed. That decision remains one for ICG's management to make. Moreover, if ICG files for abandonment, we would be statutorily bound to consider the interest of shippers such as Tammsco as part of the balancing test to decide whether the public convenience and necessity permit abandonment. We will not reopen the instant abandonment proceeding simply on the speculative hypothesis that another abandonment *may* be filed and *may* be approved. We believe that each abandonment case must be decided on its own merits. In addition, the Commission is not required to consider the affects of other applications. See for example, *People of Illinois* v. *United States,* 604 F.2d 519 at 528 (7th Cir. 1979).

The second reason advanced by protestants concerns a proposal by Burlington Northern, Inc. (BN) to seek

trackage rights over the line.[2] However, as protestants note, BN withdrew the application less than a month later to pursue additional negotiations with MoPac. Thus, BN's withdrawn trackage rights proposal has no demonstrated relevance to this abandonment. Additionally, trackage rights proposed as a condition to a merger is not an indication of public need.

MoPac's reply indicates that BN is not actively pursuing trackage rights over the line at this time. We further note that, even if negotiations were actively going forward, the decision to enter into a trackage rights proposal would be a matter in the management discretion of BN and MoPac (subject to our approval). Accordingly, speculative assertions about a possible trackage rights arrangement with BN are also no basis for reopening this 9-year old abandonment proposal for further consideration.

In sum, there is insufficient reliable evidence showing changed circumstances.

1. The joint petition filed by the State of Illinois, Illinois Commerce Commission, Tammsco, Inc. and Patrick W. Simmons is denied.

2. This decision will be effective on the date it is served.

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[2]BN's proposal was filed on January 13, 1981, in Finance Docket No. 30,000, *Union Pacific Corporation and Union Pacific Railroad Company – Control – Missouri Pacific Corporation and Missouri Pacific Railroad Company.*

By the Commission, Chairman Taylor, Commissioners Gresham, Clapp, Trantum, and Gilliam. Commissioner Calpp concurred with a separate expression.

AGATHA L. MERGENOVICH
Secretary

COMMISSIONER CLAPP, concurring:

On two prior occasions, I have expressed my belief that the proposed abandonment should not be permitted because the evidence indicated that the volume of traffic was increasing and that the amount of avoidable losses was uncertain. But a year has passed since I last expressed that view and the same situation may no longer exist. If it were shown to exist I would not hesitate to vote to reopen and deny the application.

The evidence which petitioners would have us consider does not relate to my earlier concerns and I am unable to determine if they are still valid. In view of this and, since I do not find persuasive petitioners' arguments in support of reopening on new grounds, I agree that the petition should be denied.

APPENDIX I

F-9792

INTERSTATE COMMERCE COMMISSION

DOCKET NO. AB-11

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY—ABANDONMENT BETWEEN JOPPA JUNCTION AND FAYVILLE JUNCTION, ILLINOIS

Decided March 24, 1978

Application for authority to abandon line granted subject to conditions.

REPORT AND ORDER

DIVISION 1, COMMISSIONERS BROWN, GRESHAM AND CHRISTIAN

BY DIVISION 1:

By application filed November 27, 1972, Chicago & Eastern Illinois Railroad Company (C&EI) seeks authority under section 1(18-20) of the Interstate Commerce Act (act) to abandon its line between Joppa Junction and Fayville Junction, a distance of approximately 25.7 miles, in Johnson, Pulaski, and Alexander Counties, Ill.

The application was the subject of oral hearings in 1973. Two consolidated proceedings were heard with it: docket No. AB-11 (Sub-No. 1), in which C&EI sought to discontinue its trackage rights operations over the line of the Missouri Pacific Railroad Company (MoPac) between Fayville Junction and Thebes Junction, Illinois; and docket No. AB-11 (Sub-No. 2), in which C&EI sought to discontinue its operations under trackage rights over the line of the St. Louis-San Francisco Railway Co. (Frisco) between Rockview and Chaffee, Mo.

Issuance of the initial decision was delayed until 1976 pending an environmental review. At that time, the proceedings were assigned for a hearing *de novo*, since the record was considered stale. Upon a petition filed by C&EI, arguing that the record was adequate, the Commission served the 1973 initial decision, denying all three applications, April 21, 1976.

Exceptions to the initial decision were filed by C&EI, and a joint reply was submitted by protestants Illinois Commerce Commission, Pulaski and Alexander Counties, Meeks Grain Company, C. L. Casper and John W. McGinness. By order of October 29, 1976, the

three proceedings were reopened for rehearing under modified procedure. It was noted that subsequent to the preparation of the initial decision, C&EI had been merged into MoPac pursuant to Commission authorization in *Missouri Pac. R. Co.—Merger—T&P and C&EI*, 348 I.C.C. 414 (1976), modified 559 F. 2d 408 (1977), and that no evidence had been produced in this proceeding as to the financial status of MoPac. The order instructed the parties to direct their statements to the following issues:

(1) traffic utilizing the line since the oral hearing, (2) changes in the cost of rehabilitation and operation over said lines and income or loss since 1972, (3) evidence of cost and income derived from the Rockville-Chaffee (sic) line, and (4) evidence as to the burden on MoPac from continued operations over said lines; (5) any other relevant matters they care to raise.

Applicant subsequently withdrew its related applications for discontinuance of trackage rights. One was mooted by the merger of C&EI into MoPac; applicant has determined to continue the other service.

We now have before us for consideration the verified statements and arguments under the modified procedure of the applicants, the protestants, and intervenor Edward C. Spatz. We must also act on the December 30, 1977, petition of MoPac to be substituted as the applicant, and the replies of protestants and intervenor.

PETITION FOR SUBSTITUTION

Although protestants and intervenor acknowledge that MoPac is the sucessor-in-interest to C&EI, they object to the substitution as not timely requested. They argue that the pre-1977 data reflects C&EI operations separate from those of MoPac, and that the substitution of MoPac would involve "entirely different financial and operational circumstances."

Protestants rely on *Department of Pub. Serv. Reg., etc., Mont.* v. *United States*, 344 F. Supp. 1386 (D. Mont. 1972), in arguing that, where an abandonment application is pending at the time of a railroad merger, the substitution is improper. We do not believe *Department of Pub. Serv. Reg.*, supports that proposition. On the contrary, the court held that the record must be developed on, and the Commission must consider, the effect of the posthearing merger on the financial results of operations over the line. The combined entity resulting from the merger cannot be disregarded.

We find that the data submitted under the modified procedure are those of the MoPac system and that we have before us evidence as to the burden on MoPac from continued operations over the line. The substitution of parties is a mere formality in this situation, enabling a certificate of abandonment to be issued in the name of the carrier actually owning the line. Therefore, the petition for substitution is granted.

Other Procedural Matters

Protestants maintain that they have been denied due process and a fair hearing in this proceeding. Their arguments are: (1) that the proceeding should not have been reopened, since applicant had failed to file timely exceptions to the initial decision; (2) that the modified procedure is inappropriate and the proceeding should have been set for a second oral hearing; and (3) that denial of discovery precluded a fair hearing.

The first two arguments were considered and rejected by Division 3, Acting as an Appellate Division, Commissioners Brown, MacFarland and Clapp, by order of February 18, 1977. The third argument was rejected by this Division, Acting as an Appellate Division, by order of February 6, 1978 (Commissioner Christian dissenting). To eliminate any uncertainty, we will briefly outline the reasons for those decisions.

Protestants argue that since the exceptions were not filed within the 20-day period set forth in section 17(9)(b) of the act, as amended by section 303 of the 4R Act, the decision was final as a matter of law and the rehearing is improper.

In reply, applicant points out that under new section 17(9)(i), provisions of other sections of part I pertaining to deadlines in Commission proceedings shall govern to the extent they are inconsistent with the provisions of section 17(9). MoPac also notes that new section 1a(8) of the act provides that abandonment applications pending on the date of enactment of the 4R Act are governed by provisions of section 1 in effect at that time. Former section 1(19) provided that abandonment applications were under the rules and regulations prescribed by the Commission as to hearings and other matters; section 1100.96(b) of the Commission's General Rules of Practice in effect at the time allowed 30 days for filing exceptions to the initial decision. MoPac argues that rule 96(b) thus applied, and that the exceptions were timely.

MoPac cites *Baltimore and Ohio R. Co. Abandonment*, 354 I.C.C. 67, 73, footnote 4 (1977), as support for the argument that abandonment proceedings pending as of the date of enactment of the 4R Act are not governed by its procedural provisions. However, the statement cited applies to the specific regulations governing abandonment applications contained in former Part 1121 of Title 49 of the Code of Federal Regulations, prior to revision in Ex Parte No. 274 (Sub-No. 2).

Our consideration of applicant's exceptions should not be construed as acceptance of its argument. We believe that the statutorily prescribed time limitation prevails over a rule developed by this Commission. We have held that the procedural time limits of new section 7(9) apply to pending proceedings to the extent that the event triggering the time limit takes place after enactment of the 4R Act. Here, service of the initial decision was the triggering event for filing exceptions. The provision of a 30-day preeffectiveness period in the initial decision, without more, does not constitute authorization for an additional 10 days in which to file exceptions. However, it has been our policy to apply the procedural requirements of the 4R Act with leniency during the period of transition to those requirements, when failure to do so might preclude the parties from seeking timely judicial review. See No. AB-7 (Sub-No. 20), *Chicago, Milwaukee, St. Paul and Pacific Railroad Company Abandonment Between Waukesha and Whitewater in Waukesha, Jefferson and Walworth Counties, Wisconsin* (not printed), served June 8, 1977. Furthermore, we may rely on section 17(9)(g) for reopening this proceeding, since the posthearing merger constitutes substantially changed circumstances. For these reasons, we find the reopening to have been both permissible and proper.

Protestants alternatively claim that the proceedings should have been rescheduled for oral hearing. The type of hearing designated is a matter within our discretion. This application had already been the subject of one oral hearing. The purpose of the reopening was not to develop the record anew, but simply to update it and receive evidence on the financial effects of the MoPac-C&EI merger. For this limited purpose, written evidence is adequate.

Protestants argue that the public did not receive an adequate opportunity to be heard at the hearing because their witnesses were not allowed to testify before applicant had presented its evidence. The Administrative Law Judge's ruling was not an abuse of the discretion accorded him under rule 74 of the General Rules of

Practice in effect at that time (49 CFR 1100.74), and no denial of due process resulted. We have the testimony of the major shippers on the line. In the appendix to the modified procedure order, served August 2, 1977, protestants were directed, if requesting oral hearing, to state *specifically* what, if any additional information would be presented. Protestants have failed to do so; we have no reason to believe that the additional testimony would be other than cumulative. Also, protestants have failed to satisfactorily explain why the information could not have been produced under the modified procedure. We do not find an additional oral hearing to be necessary.

Finally, protestants maintain that the denial of their discovery request precluded a fair hearing. The reasons for the denial are set forth in detail in the order served November 29, 1977, and need not be repeated. It is sufficient to note that protestants failed to present a need for the requested information warranting further delay in the proceeding.

Discussion and Conclusions

The Administrative Law Judge found the traffic on the line insufficient to support profitable operations, and there was no evidence of future increases in traffic that would alter the situation. However, he recognized the harmful economic impact of the proposed abandonment on the shippers and local communities, as well as the overall prosperity of the MoPac system. He weighed the competing interests in favor of denial of the abandonment for two reasons. First, he found the decline in traffic could be partially attributed to abnormal equipment shortages. Secondly, he held that the diversion of overhead traffic to MoPac's Benton-Thebes route was improper and a violation of the restrictions imposed in *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965).

Our analysis of the expanded record leads us to the conclusion that the abandonment should be authorized. The evidence clearly supports a finding that the operations are a burden on the carrier. It continues to sustain losses in providing service over the line. The losses incurred on this line amounted to $61,922 in 1975, $29,259 in 1976, and $12,217 during the first 3 months of 1977.

Protestants dispute these loss figures, which were computed in the manner prescribed in the regulations adopted in Ex Parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of*

Service (1976), to be codified 49 CFR part 1121. They argue that the previously accepted 50-percent allocation formula is necessary to produce figures that would be comparable to the prior data in this proceeding. They also maintain that the 50-percent formula more accurately reflects off-branch costs.

We believe the variable unit cost method adopted in the new regulations is a more accurate means of calculating off-branch costs than the arbitrary percentage formula. See *Baltimore and Ohio R. Co. Abandonment, supra* at 73-74. We do not consider comparability of data to be essential when we can benefit from more reliable evidence than we previously had. Our analysis of the merits is not based on historical operations over the line, but on the present and prospective future operations. Thus, the previous data is relevant only to the extent that it illustrates consistent deficits that may be expected to continue into the future. We note that applicant was incurring deficits on this line in 1972, using the 50-percent allocation formula, and that it is continuing to incur losses under the variable unit costing methods. Protestants have not submitted evidence establishing that the line is in fact generating sufficient revenues to meet the cost attributable to its traffic.

There is no reason to believe that the line will be profitable in the future. Traffic has steadily declined in recent years, from 454 cars/year in 1970, to 373 in 1972, and 299 in 1977.[1] There is no evidence of expected future traffic increases.

The line is in poor condition and applicant requests that we consider its estimates of rehabilitation costs as part of the burden of providing continued service. It introduced evidence that the track meets Federal Railroad Administration class I standards only and that slow orders of 10 miles per hour have been imposed as a result. (The track characterization was disputed by a union representative who was not personally familiar with the track.) It would cost an estimated $1,233,575 to bring the line up to MoPac system standards.

[1]Protestants dispute the traffic figures as inaccurate and not comparable to the figures introduced at the earlier hearing. In assessing the credibility to be attached to applicant's figures, we have considered the fact that they are drawn from regularly kept business records, that applicants have answered protestants' allegations of continued interchange traffic with an explanation for the apparent discrepancy, that evidence introduced in the environmental threshold assessment survey indicates that all interchange service was formally discontinued by Illinois Central Gulf Railroad on July 1, 1975, and that Tamms is no longer listed in the Official Railway Guide as an interchange point. We are satisfied that there is no longer any interchange or bridge traffic over the line to be abandoned.

We are further satisfied that the earlier traffic figures represent operations over the Joppa Junction-Fayville Junction line only and provide a useful measure of the trend of declining traffic on the line.

Although the line needs some rehabilitative work, considering the past deferral of maintenance, we are unable to determine the extent of work required. We agree with the Administrative Law Judge that the applicant's estimates are unacceptable. They are based on upgrading to a standard that would permit operations at 49 miles per hour. (Transcript, p. 115.) Yet, a need to operate at that speed on this low-density line has not been established. Therefore, we have not considered possible rehabilitation costs in concluding that the line is a burden to the carrier.

We must compare the burden to the carrier of continued service with the adverse effects of abandonment on the shippers and local communities. While overall system profitability is one factor to be considered, it is not determinative. The cash drain from unprofitable lines can impair the carrier's financial stability over a period of years and cause erosion of service on all its lines.

We cannot require a carrier to continue a deficit operation unless (1) sufficient traffic to support the line may be expected, (2) an overriding public need for the service exists, or (3) other factors, such as the carrier's actions, militate against approval of the abandonment. Since there is no evidence of foreseeable traffic increases, our analysis will focus on the other two possible grounds for denial.

In considering the need for the service, we look first at Tammsco, Inc., the largest user of the line. Its facility in Tamms is located near the line of the Illinois Central Gulf Railroad Company (ICG). Applicant has offered to give Tammsco a segment of its industrial siding which connects with ICG. Tammsco does not feel this connection would provide it with long-term uninterrupted rail service. It complains that ICG has reduced service at Tamms to an "as needed" basis and has filed for abandonment of a portion of its line. In its system diagram map, ICG has not indicated an intent to seek abandonment of its Tamms service, though, and there is no evidence that the ICG service would not meet the shipper's needs. We find that adequate alternative rail service is available to Tammsco and that it would not be adversely affected by the MoPac abandonment.

The testimony at the oral hearing indicates that other users of the line would be inconvenienced and would incure higher transportation costs to truck their goods to (or from) nearby railheads. However, these adverse effects are not of such magnitude to outweigh the carrier's burden. We are satisfied that adequate alternate motor-rail transportation is available.

We turn now to the two factors the Administrative Law Judge found decisive. Neither supports a denial of the abandonment application. First, there is no basis for the assumption that, if additional equipment were available, the line would generate substantially more traffic. Secondly, our approval of the MoPac-C&EI merger, without specific routing conditions, served to eliminate the two restrictions which the Administrative Law Judge felt had been violated.

FINDINGS

We find that, subject to the labor protection enacted in and developed pursuant to section 405 of the Rail Passenger Service Act, the present and future public convenience and necessity permit abandonment by the Missouri Pacific Railroad Company of its line between Joppa Junction and Fayville Junction, Illinois.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The parties are advised that this decision is administratively final under the provisions of section 17(9)(c) of the Interstate Commerce Act. Any further administrative appeal can be entertained only under section 17(9)(d) of the act which permits such an appeal only if the entire Commission finds that a matter of general transportation importance is involved, that clear and convincing new evidence has been presented, or that there exist changed circumstances which would materially affect the decision made herein. Such an appeal must be filed within 20 days of the date of service of this order.

COMMISSIONER CHRISTIAN, concurring:

As noted in the decision, I dissented from the order of February 6, 1978, which declined to permit protestants to serve interrogatories until after the submission of evidence under the modified procedure. I continue to believe that such interrogatories should have been permitted. However, after a review of the record, including protestants' requests for further hearing and cross-examination of applicant's witnesses, I am convinced that the failure to grant protestants' petition to serve interrogatories has not tainted the ultimate handling of this proceeding.

Protestants have not renewed their request for interrogatories. In addition, the only alleged factual dispute requiring further hearing

concerns the possibility that bridge and interchange traffic over the line proposed to be abandoned was not properly accounted for. This allegation by protestants' witness lack evidentiary support and it was amply refuted by applicant's witness as noted at pages 3 and 4 of the February 16, 1978 order.

In view of the fact that protestants' legitimate need for further information apparently has been satisfied, I join the majority decision.

It is ordered:

1. If any person or government entity is considering an offer of financial assistance to enable the rail service to be continued, then it should promptly give notice that it is considering such an offer by certified mail to the carrier applicant and by first-class mail to all parties of record and the Commission in accordance with the notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases," served March 31, 1976, and published on that date in the Federal Register, 41 CFR 13691, and such information shall be made available in the manner described therein.

2. Upon this order becoming effective, notice of the findings made herein will be published in the Federal Register and any offers of financial assistance must be made within 15 days from the date of that publication.

3. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

4. This order shall be effective 20 days from the date of service.

By the Commission.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

354 I.C.C.

APPENDIX G

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

Docket No. AB-11[1]

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, ABANDONMENT BETWEEN JOPPA JUNCTION, JOHNSON, PULASKI AND ALEXANDER COUNTIES, ILLINOIS

Public convenience and necesity found not shown to permit abandonment by the Chicago & Eastern Illinois Railroad Company of its lines of railroad (1) between Joppa Junction and Fayville Junction, Ill., (2) its trackage rights between Fayville Junction and Thebes Junction, Ill., and (3) its trackage rights between Rockview and Chaffee, Mo. Applications denied

James H. Durkin and *Patrick C. Mullen* for applicant.

James S. Bowie, John P. Norton, Byron L. Connell, Jr., Byron L. Connell, Sr., W.C. Spomer, George J. Nixon, Jr., Winston C. Harbicht, G. Patrick Sheahan, William J. Scott, peter A. Fasseas, Robert H. Wiorski and *Gordon P. MacDougall* for protestants.

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[1]This report also embraces Docket No. AB-11 (Sub-No. 1), Chicago & Eastern Illinois Railroad Company Abandonment of Operations between Fayville Junction and Thebes Junction, Alexander County, Illinois, and Docket No. AB-11 (Sub-No. 2), Chicago & Eastern Illinois Railroad Company Abandonment of Operations between Rockview and Chaffee, Scott County, Missouri.

By Thomas J. Callanan, Administrative Law Judge:

By joint applications filed November 27, 1972, the Chicago & Eastern Illinois Railroad Company (C&EI) seeks a certificate of public convenience and necessity under the provisions of Section 1 (18-20) of the Interstate Commerce Act permitting abandonment of (1) a segment of its line, approximately 25.7 miles in length, between Joppa Junction (Milepost 347.6) and Fayville Junction (Milepost 373.3) in Johnson, Pulaski and Alexander Counties, Ill. in Docket No. AB-11; (2) operation under trackage rights of a segment of the Missouri Pacific Railroad Company (MoPac), approximately 4.88 miles in length, between Fayville Junction and Thebes Junction, in Alexander County, Ill. in Docket No. AB-11 (Sub-No. 1); and (3) operation under trackage rights of a segment of line of the St. Louis-San Francisco Railway Company (Frisco) approximately 2.42 miles in length, between Rockview and Chaffee, in Scott County, Mo., in Docket No. AB-11 (Sub-No. 2). The segments shown to (1) and (2) shall hereinafter sometimes be referred to as the branch line and the segment shown in (3) will be referred to as the Chaffee abandonment. All locations hereinafter referred to are in Illinois, except that Illmo, Rockview and Chaffee are in Missouri, and that Memphis is in Tennessee.

Following receipt of various protests, a hearing was held at Cairo on April 26 and 27, 1973. The Frisco appeared in opposition to the No. AB-11 (Sub-No. 2) application. Other appearances in opposition to the applications were made on behalf of the Illinois Commerce Commission and the general public; Lucille Meeks, doing business as the Meeks Grain Company, otherwise known as the Perks Grain Company; C. L. Casper, a farmer and owner of a general store at Perks, and over 200 other farmers located in the Southern Illinois area; the County of Pulaski; the

Board of Commissioners of the County of Alexander; Tammsco, Inc.; the American Train Dispatchers Association; the Brotherhood of Maintenance of Way Employees; the Brotherhood of Locomotive Engineers of the State of Illinois; and the United Transportation Union. Separate briefs were filed by applicant and the Frisco and a joint brief was filed by Thomas J. Duggan for the United Transportation Union; the Illinois Commerce Commission; the Meeks Grain Company; C. L. Casper and Pulaski and Alexander Counties.

As stated in the application, the C&EI proposes to abandon a segment of its line between Joppa Junction (Cypress and Fayville Junction (25.7 miles), also its trackage rights over the MoPac between Fayville Junction and Thebes Junction (4.88 miles), and its trackage rights over the Frisco Between Rockville and Chaffee (2.42 miles). On the other hand, it proposes to retain its trackage rights over the bridge across the Mississippi River on the Southern Illinois & Missouri Bridge Company (SI&M), connecting Thebes with the St. Louis Southwestern Railway Company (Cotton Belt) at Illmo and its trackage rights over the Cotton Belt extending to Rockview. Because of an unexplained management decision, applicant intends to retain these trackage rights although it states that if the branch line and Chaffee abandonments are granted, C&EI movements to the South over the Benton-Gorham-Thebes route under MoPac trackage rights would terminate at Thebes.

Operations over the branch lines consist of not to exceed two trips a week on an as-needed basis, and once a week on Friday to Chaffee. On Tuesdays and Fridays a round trip is made as far as Tamms by a local train operating out of West Frankford. The train consists of one power unit and a caboose with an engineer, a conductor and two

brakemen. Ten to fifteen cars are interchanged with the Cotton Belt and approximately eight and one-half to nine loads are run out of Chaffee. Thirty-two to thirty-four trains are operated by the MoPac System via Rockview per day. The branch line is located in the southern part of Illinois in an area which is largely agricultural. No passenger, mail or express services are handled on the branch line. While the population of Johnson County has increased from 6,928 to 7,550 persons between 1960 and 1970, the population of the other two counties which the branch line traverses has decreased. For example, the population of the largest county, Alexander, decreased from 16,061 to 12,015 persons during the period. The record indicates that no new industries have been established on the branch line in many years. Tamms, with a population of 645 persons, has the only agency station on the branch line. Olive Branch, population 500, and Perks with a population of 350, are non-agency stations. There are no through Chicago trains operated on the branch, as Chicago trains to and from the South are routed through Benton, Gorham, and Thebes via the MoPac because of a trackage right agreement with that carrier. Six C&EI trains a day are operated on this basis. It is estimated by applicant that payments to the MoPac amount to $153,500 annually for this privilege.

As shall be hereinafter shown, testimony has been developed depicting the harmful effect the proposed abandonments would have on shippers, farmers and communities in the area. By means of reference to a Commission proceeding wherein control by the MoPac of the C&EI was approved, applicant states that the C&EI was found to be a relatively small, financially weak, and physically deficient railroad. See *Missouri Pac. - Control -Chicago & E.I.R. Co.*, 327 I.C.C. 279, 323. The record

now shows an entirely different situation. Applicant's financial position as of December 31, 1972 shows that it had current assets of over $14 million, as compared to current liabilities of less than $10 million, and total assets of over $90 million. Also, applicant's net income increased from $753,207 in 1970 to $1,273,283 in 1971, and then to $2,715,395 in 1972. Its net income from railway operations rose from $821,934 in 1970, to $2,228,836 in 1971, and to $3,339,744 in 1972.

Applicant claims that the branch line is in extremely poor condition and that two-thirds of the line's ties, namely 48,600 ties, will have to be replaced. The line is in fair to poor condition. Embankments are eroded, some ditches have been filled in and the right-of-way, which has a grade line of generally less than one-tenth of one percent, is in need of restoration. The 90-pound rail which is approximately 50 years old is, admittedly, in fair condition. There are 21 bridges on the branch which either have to be reconstructed or strengthened. Twenty highway or road crossing would be eliminated if the abandonment is permitted. Without considering wage increases occurring since February 23, 1973, applicant estimates the cost of rehabilitation would be $649,935, based on MoPac System average cost. This costs, of course, would include the cost, for example, of the installation of 119-pound and 112-pound track on the MoPac's Benton-Gorham-Thebes line. Applicant's estimated normalized cost per mile of maintaining the branch line, based on labor rates in effect April 1, 1972, is $3,065 per mile, or a total of $78,770 for the 25.7-mile length of branch line track. Actual maintenance-of-way expenditures for the year, 1972, were $42,303. Increased costs for labor would raise these figures by approximately 20 percent. When applicant was asked whether the $649,935 estimate would bring the

branch line up to Class II, III or IV FRA Standards, its witness replied that the line would be brought to "Missouri Pacific Standards." It is claimed that if the branch line were to be upgraded to handle through trains, annual maintenance costs would be increased threefold. The net salvage value of the branch line is estimated at $248,460.

The C&EI's freight operating ratio in 1971 was 78.58 percent. Based on ratio of 50 percent, which is considered too low, applicant indicates net system gain from the abandonment of the branch for the years 1970 to 1972 would have been $31,678, $29,352 and $24,344, respectively. However, as protestants point out, certain corncob revenues amounting to $55,788 for 1970, $35,974 for 1971 and $6,141 for 1972, were excluded from the computation. These revenues were excluded because the corncob movement is no longer handled over the branch line route. Formerly, the corncobs which originated around Danville moved over the C&EI, through Joppa Junction and Thebes to Illmo where the traffic was interchanged with the Cotton Belt. Now, the movement is over the C&EI to Benton, thence over its MoPac trackage right to Thebes for MoPac movement to Memphis and points beyond. Applicant's witness was not certain that interchange with the Cotton Belt at Illmo would be continued if the abandonments are permitted.

The amount of the rehabilitation and maintenance-of-way cost submitted by applicant are subject to serious question. This Commission has no norms by which to evaluate the objectivity of applicant's claims. The estimates appear to be too high, especially in view of the fact that applicant admits that the branch line is presently safe for operation, and that the 21 bridges on the line, as well as the track on the rest of branch line, are safe to traverse at a speed of 30 miles per hour. No derailments

have occurred in recent months and there is no testimony that derailments have ever occurred due to the poor conditions of the track. Although applicant claims that two-thirds of the ties on the branch line need renewal, there have been no heavy tie renewals in the year 1969, 1970 or 1971. Perhaps the $153,500 annual expenditures made for the use of trackage rights over the MoPac between Benton and Thebes could be better employed in keeping the branch line in good condition.

There is no opposition to the proposed abandonment of applicant's trackage rights over the MoPac between Fayville Junction and Thebes Junction, and the record does not show Fayville to be an interchange point with the MoPac. As previously stated, the continuation of Illmo gateway is uncertain. Objection to the elimination of the Tamms gateway would be withdrawn if Tammsco, a protestant herein, could be assured of service from the ICG. On the other hand, the Frisco strongly objects to proposed abandonment of the Chaffee interchange point. It rightly claims that the Frisco-Chaffee interchange is an integral portion of a route and channel of trade currently moving significant volumes of traffic. In defense of its proposal, applicant states that the Frisco-C&EI route through Chaffee is not a good service route since interchange there occurs only once a week and traffic has declined steadily in recent years.

As to the communities which would be affected by the proposed abandonments, Perks is approximately six miles from the lines of the Penn Central and the C&EI at Karnak, Tamms is located on the main line of ICG and Olive Branch is four miles from the line of the MoPac. There is an ample network of highways and available motor service in the area.

PROTESTANTS

Perks (or Meeks) Grain Company has a grain elevator, scales, storage tanks and an office at Perks. It has been in operation since 1964 on ground leased from the C&EI. It services about 200 farmers in the area. There are no other railroads serving Perks. The additional costs entailed in trucking its grain out of Perks would put it out of business because of competition. Consequently, if the abandonment is permittted, this grain company would not only lose 10 to 15 thousand dollars per year in profits, but would also lose most of its investment in excess of $75,000, because these assets would be useless. Originally, when the proposed abandonment of the branch line was discussed with the C&EI, a representative of that road said that the C&EI planned to keep the line open between Joppa Junction and Perks, a distance of three or four miles. As can be seen here, nothing was done about the matter. The Perks Company ships by rail exclusively. During the 1967-1969 period, 369 cars were tendered. In 1970, the annual movement dropped to 54 cars. This shipper claims that before the MoPac gained control of the C&EI, the rail service was good. Now, its business has tapered off because it cannot get enought equipment to load. Its business would increase if an adequat supply of rail cars would be provided.

C.L. Casper owns and operates a general store at Perks. He is also a part-time operator, with his son, of a 1300-acre farm. In his dual position, he is in contact with and has received affidavits in opposition to the proposed branch line abandonment from numerous other farmers throughout the five-county Perks area. in his opinion, the proposed abandonment would necessitate the additional expense of buying trucks and providing labor, which is extremely hard to secure, especially at harvest time, to move

grain to other elevators. Highway distances of from 20 to 30 miles are involved. He estimates that additional costs of at least 25 to 30 cents per bushel for the truck, insurance and manpower would be incurred. When asked by applicant's counsel whether he would be willing to join a group which would underwrite the losses that would result from the continued operation of the line, he answered in the negative.

Three other farmers from the Perks area and one from Olive Branch testified in opposition to the abandonment. Their testimony was similar to that of Mr. Casper, although their estimates varied as to the additional trucking costs that would be occasioned if the abandonment were permitted. There were also complaints about not being able to secure rail equipment.

Allan Foster of the Foster Implement Company, at Olive Branch, is a retail farm equipment dealer. The company has been in business since 1964 and sells Massey-Ferguson equipment. Eighty percent of its merchandise comes in by rail as much of the equipment is too large to move by truck and must even be special routed by rail on account of its width. Six to fifteen carloads are shipped annually. Mr. Foster has never used any point other than Olive Branch for the delivery of its equipment. The company is located 400 feet from the C&EI t[illegible]ks. The only other dealer at Olive Branch has gone out of business. Mr. Foster is also concerned about the proposed abandonment because the movements of fertilizer to Olive Branch would also cease and farmers in the area would be disadvantaged.

Tammsco, Inc. is the largest shipper out of Tamms. It mines and manufactures silica which is primarily used as an extender in paints. Tammsco ships nationwide and has

competition from manufacturers at other points. Its product is sold in 50-pound bags. Approximately six 40-ton carloads per week are moved by rail. In 1972 Tammsco moved 273 or 276 carloads of silica by rail. Twenty percent of the product moves by truck, mostly to nearby locations. It hires 22 employees and business is increasing. If Tammsco could be assured of satisfactory rail service from the ICG, whose main line runs through Tamms, it would withdraw its opposition to the abandonment. At the time of hearing, only a vocal assurance of service was given. The silica rates of applicant and ICG are substantially the same. Applicant stated on the record that it would sell to Tammsco at a reasonable price the land on which the company's plant is located, and would give Tammsco its industrial siding which connects with ICG. This commitment appeared to satisfy Tammsco's objections to the branch line abandonment.

A Commissioner of Pulaski County appeared in oposition to the abandonment of the branch line. Of the 25.7 miles of track proposed to be abandoned, 12 miles run through Pulaski County. C&EI is the only railroad running practically east and west over good flat land which is ideal for industrial location. There is plenty of water and a sufficient amount of power available. The Joliet Development Area and the Mississippi-Ohio Development Agency have undertaken a study concerning development of the area. Loss of the $12,000 taxes paid annually to the County would affect capacity to aid school districts and towns within the County and other activities. To permit the proposed abandonment would have definite harmful effects, economically and financially, upon the County. The Commissioner was unaware of any new industries having located in the County in the last decade.

The Chairman of the Board of Commissioners of Alexander County, through which about 12 miles of the branch line runs in an east-west direction, also opposes the proposed abandonment. The C&EI trackage has an assessed value of approximately $255,000. Taxes generated therefrom amount to $15,000 to $17,000 per year. A loss thereof would affect the school system and other activities, such as its mosquito abatement program, which the County supports. The County is primarily agricultural. There has been no new industrial development in the area in recent years, and the Chairman knows of no plans for the development of new industries in the County. However, the proposed abandonment would have an impact on the economic problems of the County, especially its farmers, and would depress the attitude of the people in the area. Also the possibility of future industrial development in the area would be discouraged.

The Acting Assistant Director for the Mississippi-Ohio Valley Planning and Development Commission and also a representative of the Cross Alexander Development Corporation appeared in opposition to the proposed abandonments. Although this witness admits that railroad return on investment has not been good in that return for Class I railroads over the past ten years averaged only about 2.7 percent, it is in effect claimed that continued rail service is necessary for regional development and that one of the factors in industry consideration of location of a new plant is the availability of efficient and economic freight transportation. It is further claimed that industry is beginning to locate in rural areas and that young people are returning from the large cities. While approximately six new industries have located in the Mississippi-Ohio region, there is no showing that they utilized the services of the C&EI. These industries have created 200 jobs in the past two and one-half years. There is potential of an addi-

tional 150 jobs in the next 12 to 18 months. This witness discussed the Tammsco, Inc.'s successor and claims that railroad service has a great impact on the economic growth of this company He claims that he does not know what the railroad calls a fair price, but that at any rate the successor company cannot afford at this time to make additional commitments.

The Brotherhood of Railway and Airline Clerks states that the agent at Tamms is a member of its union and that there is serious question whether the station agent's wages at Tamms could be saved in the event of abandonment because of the protective provisions of its union contract with the C&EI.

A witness for the American Dispatchers' Association explained that the April 1, 1973 increase in employees' health and welfare benefits was minor. His testimony also provided further details concerning the corncob movement which has already been discussed and that the distance from Benton to Thebes over MoPac trackage rights is 76 miles as compared to approximately 79 miles over the C&EI Fayville Juntion-Thebes route.

The testimony of the Frisco witness conflicted with the figures of movement submitted by applicant on traffic interchanged via the Chaffee gateway, and as to the interchange of one commodity in the first three months of 1972. Detailed discussion thereof is not considered necessary in reaching the decision herein.

DISCUSSION AND CONCLUSIONS

It is clear from the evidence submitted that the revenues presently provided by the traffic on the branch line have not been sufficient to allow a profitable operation thereof.

The proposed Chaffee abandonment, however, is a different matter in that no rehabilitation or maintenance-of-way costs are borne by applicant in connection with the interchange to the Frisco at this gateway. The expenses for the operation of this 2.42 miles of track between Rockview and Chaffee over the line of the Frisco is made by p ayment for luse of the Frisco trackage rights, a sum that is not of record. if applicant is dissatisfied with the revenues secured from traffic moving over this gateway, it could effectively close the route by proposing the cancellation of such joint rates as are applicable over Chaffee, or if it has local point to point rates between Rockview and Chaffee, raise the level of those rates to a point where operation over the trackage right route would be feasible. Such action, of course, would be properly subject to investigation under a Commission "I & S" proceeding. It is concluded that justification for the proposed Chaffee abandonment by applicant is not adequate.

So far as the proposed branch line abandonment is concerned, testimony of record has shown the harmful economic effect that the abandonment of the branch line would have on shippers, farmers, and, indirectly, the communities in the involved area. It is recognized that the overall prosperity of a carrier is to be given consideration in balancing public convenience and necessity against the undue burdens on interstate commerce, but this factor is not controlling. *Colorado* v. *United States,* 271 U.S.153. There are two forceful reasons to balance testimony of record here in favor of the interests of public convenience and necessity. The decline of branch line traffic is, at least, partially attributable to the shortage of equipment which, under normal circumstances, applicant would be able to provide. The other, and more important reason, is that the C&EI decided to channel traffic between Chicago, for ex-

ample, and points in the South over its MoPac Benton-Thebes trackage rights route. Obviously, the loss of earnings secured from bridge traffic over the exclusive C&EI route between Thebes and Benton vis-a-vis the MoPac trackage right route attributed to the branch line's deficit operations. The results of such a system management decision should not be borne by shippers and communities located on the branch line. The purpose of the *Control Case* was not to dismantle the C&EI, but to build it up.

The issues raised herein, however, can be resolved very simply. In the *Control Case* certain definite limitations were set forth when the MoPac control over the C&EI was authorized by the Commission. One limitation was that the C&EI would maintain and keep open all routes via existing junctions and gateways "unless and until we authorize otherwise." There were also other limitations set forth, including a mandatory observance of neutrality in handling inbound, outbound and overhead traffic by the C&EI. From the record established here, one cannot help but to conclude that these two mandatory restrictions would have to be ignored if the applications here were to be granted. Sufficient justification has not been offered to justify their waiver.

FINDINGS AND ORDER

Upon consideration of all the evidence of record, it is clear that the adverse effect upon the public outweighs applicant's justification for the proposed abandonments and that continued operation of the branch line and the interchange connection with the Frisco at Chaffee will not significantly affect the quality of the human environment. I, therefore, find that applicant has failed to show that public convenience and necessity permit the proposed abandonments and that the applications should be denied.

It is ordered, That in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service hereof.

Dated at Washington, D.C., this 26th day of October, 1973.

By the Commission, Thomas J. Callanan, Administrative Law Judge.

ROBERT L. OSWALD
Secretary

(SEAL)

Opposition

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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. ~~81-1048~~ 81-1084

In the

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

BRIEF OF MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JANUARY, 1982

The Scheffer Press, Inc.—(312) 263-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1084 ~~81-1048~~

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

BRIEF OF MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Missouri Pacific Railroad Company,[1] intervening respondent in the review proceeding in the United States Court of Appeals for the Seventh Circuit, respectfully prays that the petition for a writ of certiorari (hereafter, "Petition") filed by the People of the State of Illinois, et al., be denied.

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[1] Missouri Pacific Railroad Company is a wholly-owned subsidiary of Missouri Pacific Corporation, a holding Company. In addition, Missouri Pacific Railroad Company owns, either solely or jointly with other railroads, the following corporations, none of which has issued stock to the public: The Alton & Southern Railway Company; American Refrigerator Transit Company; Arkansas & Memphis Railway Bridge and Terminal Company; The Belt Railway of Chicago; Brownsville & Matamoros Bridge Company; Chicago & Western Indiana Railway Company; Chicago Heights Terminal Transfer Railroad Company; Doniphan, Kensett & Searcy Railway; Galveston, Houston and Henderson Railway Company; Great Southwest Railroad, Inc.; Houston Belt & Terminal Railway Company; Illinois Terminal Railroad Company; Jefferson Southwestern Railroad Company; Kansas City Terminal Railway Company; Missouri Improvement Company; Missouri Pacific Airfreight, Inc.; Missouri Pacific Intermodal Transport, Inc.; Missouri Pacific Truck Lines, Inc.; MP Equipment Corp.; Park Spring, Inc.; The Pueblo Union Depot and Railroad Company; Southern Illinois and Missouri Bridge Company; Stonegate Park, Inc.; Terminal Industrial Land Company; Terminal Railroad Association of St. Louis; Texas & Missouri Pacific Railroad Company; Texas City Terminal Railway Company; Trailer Train Company; and Weatherford Mineral Wells and Northwestern Railway Company.

REASONS FOR DENYING THE PETITION

The petition for writ of certiorari presents no important question of law, nor does it present any of the considerations set forth in Supreme Court Rule 17 or any other reason for granting the Petition.

I. THE ISSUES PRESENTED BY THE PETITION FOR CERTIORARI ARE, BY PETITIONERS' ADMISSION, MOOT

The Court of Appeals on December 14, 1981, denied petitioners' motion for a stay of abandonment, scheduled for December 15, 1981, (copy attached hereto as Appendix A). Also on December 14, 1981, petitioners applied to Mr. Justice Stevens for a stay of abandonment, stating that upon abandonment the land (over which Missouri Pacific operated under easements) would revert to the owners, thereby rendering the issues herein moot. The application is reproduced as Appendix B hereto.

Mr. Justice Stevens denied petitioners' application for stay on December 15, 1981, (copy of notice attached hereto as Appendix C), and Missouri Pacific abandoned operations over the branch line on that same day. The issues presented by the petition for writ of certiorari therefore are moot.

II. THERE IS NO CONFLICT BETWEEN THE HOLDINGS OF THE COMMISSION AND THE COURT OF APPEALS ON THE APPLICABILITY OF THE D.T.&I. CONDITIONS

Petitioners purport to see inconsistencies between the decisions of the Court of Appeals and the Commission as to the status of the D.T.&I. conditions imposed in a

railroad merger when the merged carrier later seeks to abandon a branch line (Petition, page 13). There are no inconsistencies. The Court of Appeals expressly held that the Commission's position that subsequent abandonment proceedings must be considered on their own merits without regard to prior merger conditions has considerable support in the relevant statutory provisions (Petition, page 8a). The Court concluded that "the ICC correctly ruled that the D.T.&I. conditions do not prohibit, as a matter of law, the abandonment of the 25.7 mile segment of MoPac track in question" (Petition, page 10a).

The Court of Appeals also agreed (Petition, page 8a) with the Commission's position that the D.T.&I. conditions are for the protection of railroads which compete with the merged or consolidated railroads. More specifically with respect to the Commission's stated purpose in imposing D.T.&I. conditions in the *Mo-Pac-C&EI Control* case, 327 ICC 279 (1965), the Court said (Petition, page 8a):

> The *Control* case itself states that the conditions "will provide just and reasonable limitations upon the ability of Missouri Pacific and Eastern to favor selected routes and gateways or to vary the degree of cooperation with the [intervenor railroads] in regard to schedules, interchanges, of freight, or other arrangements." *Control,* 327 I.C.C. at 309. Both here and in general, the I.C.C.'s intention is to restrain anti-competitive conduct.

The Court went on to point out that petitioners in the abandonment proceeding under review had not shown that abandonment of the segment would adversely affect the competitive posture of any other carrier (Petition, page 9a).

The Court recognized that a merged carrier's anti-competitive activities toward competing railroads may indirectly affect shippers. The Court concluded, however, that there had not been a sufficient showing of such indirect injury to shippers on the segment related to any indirect benefits provided to them by the anti-competitive conditions (*idem*, page 9a). Petitioners refer to no evidence of such a relationship, and there is none.

The holdings of the Court of Appeals are eminently correct. The St. Louis-San Francisco Railway had intervened in the AB-11 (Sub. no. 2) abandonment proceeding, in opposition to the C&EI's proposed abandonment of the Chaffee, Missouri, interchange point with that railroad (Petition, page 60a). When the C&EI subsequently withdrew that Sub. no. 2 application, the St. Louis-San Francisco Railway withdrew from the Commission's proceedings. No railroad intervened in opposition to the subject AB-11 abandonment, and no routes with other railroads have been or will be closed as a result of the subject abandonment. The main-line route through Thebes to connections beyond remains as before. Fayville Junction has not been a point of interchange with any other carrier (Petition, page 60a).

III. THE HOLDINGS OF THE COURT OF APPEALS AND THE COMMISSION ACCORD WITH THE COMMISSION'S LONG-STANDING PRECEDENTS AND ITS DECISION IN THE CONTROL PROCEEDING

"In virtually every merger approval since 1950 the Commission has imposed D.T.&I. conditions permanently while retaining jurisdiction to amend or remove the conditions at any time." *Missouri-Kansas-Texas Railroad Company, et al.* v. *United States, et al.*, 632 F2d 392, 404

(5th Cir., 1980) cert. den. 49 USLW 3882. The purpose of these conditions was "to protect the market shares of competing carriers, to compensate a carrier for anticipated losses, to improve the position of a carrier, or to aid carriers even though they were not likely to be harmed by the subject merger" (*idem.* page 400). The Commission's holding in the subject abandonment proceeding, that the D.T.&I. conditions were imposed for the protection of railroads not party to the merger, is consistent with established Commission precedent.[2]

Similarly, it has been the Commission's long-standing policy, from which it has not deviated, to consider rail line abandonments of previously-merged railroads on the merits of the abandonment proposal, without regard to D.T.&I. conditions imposed in earlier merger or consolidation proceedings. *Chicago and Northwestern Railway Company-Purchase-Minneapolis and St. L. Railway Company,* 312 ICC 285, 295 (1960); *Toledo, P.&W. Railroad Company Control,* 295 ICC 523, 543 (1957). Even when applicants in the course of a merger proceeding gave repeated assurances that they would not seek abandonment of any rail lines as a consequence of the merger, the Commission has held that such abandonments would have to be sought and decided under the statutory provisions relating to abandonment of rail lines. *Pennsylvania Railroad Company-Merger-New York Central Railroad Company,* 327 ICC 475, 493 (1966).

Unlike the applicants in the *Pennsylvania-New York Central* merger proceeding, neither the Missouri Pacific nor the C&EI gave any assurance in their *Control* or

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[2] As petitioners intimate (Petition, page 13) the Commission's current thinking is that the D.T.&I. conditions are contrary to recently enacted legislation.

Merger proceedings that they would not subsequently file any abandonment applications. To the contrary, Missouri Pacific proposed in the *Control* proceeding that the two carriers establish new through routes and joint use of facilities. 327 ICC 279, 286, 341. And the Commission observed in the *Control* proceeding that the consolidation of the two railroads probably would result in some rail line abandonments, but less than would be the case where the affiliating carriers operate side-by-side. 327 ICC 279, 286.

Contrary to petitioners' contention (Petition, page 14), Missouri Pacific did not, in the *Control* proceeding, promise shippers and communities in southern Illinois improved service over the former C&EI main line with a "Fayville connection" 5 miles south of Thebes. The C&EI already had a route to Thebes (*Control* case, 327 ICC 279, 285) and, as is evident from the language quoted on page 4 of the Petition, Missouri Pacific's proposal was directed toward the more expeditious handling of through trains between Chicago and the Southwest via the Missouri Pacific-C&EI interchange at Thebes. *Control* case, 327 ICC 279, 289. Operation of through trains between such points could not possibly have been for the benefit of shippers and communities in southern Illinois, particularly those between Joppa Junction and Fayville Junction, which were served only by a local train (Petition, page 56a).

Petitioners showed no interest in obtaining protective conditions in the *Control* or *Merger* proceedings. The D.T.&I. conditions were sought by, and imposed for the benefit of, connecting railroads. *Control* case, 327 ICC 279, 282, 307-309; *Merger* case, 348 ICC 414, 420-425. For all that appears, petitioners herein were not parties,

or were inactive, in the *Control* and *Merger* proceedings. See 327 ICC at 282 and 348 ICC at 414-415.

IV. THE COMMISSION IN 1968 AUTHORIZED THE C&EI TO ACQUIRE TRACKAGE RIGHTS OVER THE MISSOURI PACIFIC'S LINE BETWEEN BENTON AND THEBES FOR THE PURPOSE OF OPERATING THROUGH TRAINS

After Missouri Pacific acquired control of the C&EI in 1967, several years after close of the hearings on its application, it became evident that the C&EI's line in southern Illinois would not support heavy, high-speed through trains without making tremendous expenditures to upgrade the line.

By order dated January 29, 1968, in *Finance Docket No. 24885, Chicago & Eastern Illinois Railroad Company-Trackage Rights-Missouri Pacific Railroad Company,* the Commission authorized the C&EI to acquire trackage rights over the Missouri Pacific's line between Benton and Thebes, Illinois, for the purpose of handling heavy high-speed through trains, and to save the $2,500,000 that would have had to be expended to upgrade the C&EI's line between Benton (north of Joppa Junction) and Fayville. A copy of the Commission's order is attached hereto as Appendix D, pages 6a-7a. A reprint of a map of the Joppa Junction - Fayville branch and the Missouri Pacific's line between Benton and Thebes is included as Appendix E, page 9a.

None of the petitioners herein, and no railroad, intervened in the Finance Docket No. 24885 proceeding for the purpose of contending that the D.T.&I. conditions imposed in the *Control* proceeding prohibited diversion of through trains from the Joppa Junction - Fayville Junction line, or for any other purpose. The C&EI, and

later the Missouri Pacific, have been operating through trains over the Benton-Gorham-Thebes line of the Missouri Pacific since 1968 (Petition, page 57a), and no through routes were closed as a result thereof.

As observed by the Court of Appeals in the instant review proceeding, the D.T.&I. conditions "do not pertain to a railroad's neutral managerial decisions as to which internal route will be employed for through traffic" (citation omitted) (Petition, page 10a, fn. 15).

Thus, petitioners' basic grievance — the routing of through trains over the Missouri Pacific's line between Benton and Thebes — relates to a practice initiated in 1968 pursuant to authorization by the Commission. The matter was and is within the managerial discretion of the railroad, and was not prohibited by the D.T.&I. conditions.

V. ILLINOIS CENTRAL GULF'S PLACEMENT OF ITS NEIGHBORING LINE ON ITS SYSTEM DIAGRAM MAP IS IRRELEVANT TO THE ISSUES HEREIN

Both the Commission and the Court of Appeals held that the subject abandonment case must be decided on its own merits, without regard to the fact that the Illinois Central Gulf Railroad (ICG) has indicated on its system map that it may file an application within three years to abandon its line serving Tamms, Illinois (Petition, pages 16a, 42a). As the Court of Appeals observed, the Commission is statutorily required to consider the interest of shippers such as Tammsco in determining whether public convenience and necessity would permit the ICG abandonment (Petition, page 16a).

In *People of the State of Illinois, et al.* v. *Interstate Commerce Commission, et al.*, 615 F2d 743, 749 (7th Cir.,

1980), cited by the Court of Appeals, it was held that to require the Commission to specifically consider the effect of an abandonment on a proposed future abandonment of a neighboring segment of the same railroad would be inconsistent with Commission precedent of many years standing (citing cases).

It could well be that ICG never will seek to abandon its neighboring line. See, for example, the ICG's amendment to its abandonment application reviewed in *People of the State of Illinois* v. *Interstate Commerce Commission, et al.*, 615 F2d 743 (7th Cir. 1980) and the C&EI's withdrawal of its abandonment application in AB-11 (Sub-no. 1) and AB-11 (Sub-no. 2) in the proceeding under review herein (Petition, page 20a, fn. 1).

Missouri Pacific's former C&EI line is in direct competition with the ICG's lines between St. Louis and Chicago and between Chicago and Ohio River points. *Missouri Pacific Railroad Company-Control-Chicago & Eastern Illinois Railroad Company*, 327 ICC 279, 285 (1965). If petitioners' contention were sustained, ICG and Missouri Pacific could inflict economic harm on each other merely by including their competing lines as candidates for abandonment in their system diagram maps, thereby preventing each other from abandoning unprofitable branch lines. The same is true of any two or more competing railroads, to the detriment of the national transportation system. As the Court of Appeals observed, "if we were to consider every prospective (and presently hypothetical) abandonment as relevant to the one before us, we might never bring any case to a close," citing *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503, 514-15 (1944) (petition, page 16a). In this connection, this relatively minor abandonment proceeding has been pend-

ing before the Commission and the courts for more than nine years.

Petitioners actually argue that the Commission is required, on pure speculation and without any evidence to support such requirement, to order two railroads, Missouri Pacific and ICG, to maintain rail service to Tamms for the convenience of one shipper, Tammsco, Inc. Such a requirement would be preposterous and would far exceed any powers vested in the Commission.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 14, 1981

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. HARLINGTON WOOD JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, PULASKI COUNTY, ALEXANDER COUNTY, PERKS GRAIN COMPANY, C.L. CAPER and JOHN W. MCGINNESS,

Petitioners,

CAIRO CHAMBER OF COMMERCE, the SOUTHERN ILLINOIS TRANSPORTATION ASSOCIATION, and the CITY OF CAIRO,

Intervenors,

vs.

Nos. 78-1710 & 80-1908

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening-Respondent.

Petitions for Review of an Order of the Interstate Commerce Commission

This matter comes before the court for its consideration upon the filing of the following documents:

1) The "MOTION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI TO THE U.S. SUPREME COURT," filed herein on December 3, 1981 by counsel for the petitioners;

2) The "REPLY TO MOTION FOR STAY PENDING PETITION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT" filed herein on December 4, 1981 by counsel for the intervening-respondent;

3) The "MEMORANDUM . . . IN OPPOSITION TO STAY OF COMMISSION DECISION PENDING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT," filed herein on December 9, 1981 by counsel for the respondent, Interstate Commerce Commission;

4) The memorandum on Legal Standard for stay by Court of Appeals of Railroad Abandonment pending Petition for Writ of Certiorari to U.S. Supreme Court.

On consideration thereof,

IT IS ORDERED that the motion for stay filed by counsel for petitioners is hereby DENIED. The Court notes that this does not preclude counsel for petitioner from petitioning the U.S. Supreme Court for stay pending its disposition on the petition for writ of certiorari.

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, PULASKI COUNTY, ALEXANDER COUNTY, PERKS GRAIN COMPANY, C.L. CAPER and JOHN W. MCGINNESS,
Petitioners,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

APPLICATION FOR STAY

TO THE HONORABLE JOHN PAUL STEVENS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

The above-captioned petitioners, parties to No. 81-1084, a petition for a writ of certiorari docketed December 10, 1981, pray that an order be entered staying the operation of the Certificate and Decision of the Interstate Commerce Commission ("I.C.C.") in its Docket No. AB-11, *Chicago & Eastern Illinois Railroad Company—Abandonment—Between Joppa Junction and Fayville Junction, IL,* which otherwise becomes operative at 12:01 A.M. Tuesday, October 15, 1981.

A copy of the foregoing abandonment certificate is attached hereto as Appendix A. The petition for writ of certiorari is attached hereto as Appendix B.

The Court of Appeals on November 27, 1981 stayed its mandate, but today at apx. 2:30 P.M. CST advised that

our December 3 request for stay was denied. The Court of Appeals on Friday, December 11, 1981, issued an order, attached hereto as Appendix C, to which we responded today, Appendix D.

Today's order of the Court of Appeals denying a stay is not yet available; however, we are advised it consists of a single sentence denying our request.

REASONS FOR GRANTING A STAY

A stay should be granted to protect the jurisdiction of the Court. This is a line abandonment case, and the land will revert upon abandonment. Abandonment is scheduled for midnight tonight, and if allowed to take effect will moot the issues before the Court in No. 81-1084.*

The citations for the justification for a stay are set forth in Appendix D, hereto.

Respectfully submitted,

December 14, 1981

---

* We suggest the stay continue until disposition of our petition for a writ of certiorari.

APPENDIX C

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

December 15, 1981

Gordon P. MacDougall, Esq.
1120 19th Street, NW
Washington, DC 20036

James E. Weging, Esq.
Assistant Attorney General
Room 1300
228 North LaSalle Street
Chicago, Illinois 60601

RE: Illinois, et al. v. United States, et al.
No. 81-1084
A-525

Dear Counsel:

Your application for a stay in the above-entitled case has been presented to Justice Stevens, who has endorsed thereon the following:

"Deny
12/15/81
John Paul Stevens"

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By
Katherine Downs
Assistant Clerk

rwk
cc: Honorable Rex E. Lee
James H. Durkin, Esq.
Edward C. Spatz, Esq.

APPENDIX D

SERVICE DATE

JANUARY 31, 1968

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington, D.C., on the 29th day of January, 1968.

Finance Docket No. 24885

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD CO.

Upon consideration of the application filed December 15, 1967, under Section 5(2) of the Interstate Commerce Act, by the Chicago & Eastern Illinois Railroad Company, a common carrier subject to Part I of the act, for authority to acquire trackage rights over the line of the Missouri Pacific Railroad Company between the latter's track connections with applicants' tracks at Benton, Franklin County, Ill., and North Junction (Thebes), Alexander County, Ill., a distance of about 75.4 miles, pursuant to the terms of a proposed trackage rights agreement between the parties, submitted as part of the application; and of protests to said application filed by Railway Labor Executives' Association and the Brotherhood of Locomotive Engineers on the ground that the transaction, if approved, could have an adverse effect on carrier employees; and

It appearing, and the Board so finds, that a hearing is not necessary in the public interest; that the interest of railway employes will be protected by the imposition of appropriate conditions; that the trackage rights will enable applicant to realize economies including savings of expenditures of about $2,500,000 for rehabilitation of the line between Benton and Fayville; necessary if the line were to be put in condition to handle heavy high-speed trains; that the terms of the proposed agreement whereby

applicant will pay to the Missouri Pacific (1) $1.75 per train mile for each train up to an average of two trains per day in a calendar month; (2) $1.10 per train mile for each train in excess of (1) above up to an average of 4 trains per day in a calendar month; and (3) a fair and equitable train mile rate to be mutually agreed upon for trains in excess of (1) and (2) above, and other terms of the agreement, submitted as part of the application, are found to be just and reasonable; that the transaction is within the scope of section 5(2) of the act, and will not result in the guarantee or assumption of the payment of dividends or fixed charges; that no increase in fixed charges will result; that no other railroad has requested to be included in the transaction; and that the transaction will be consistent with the public interest;

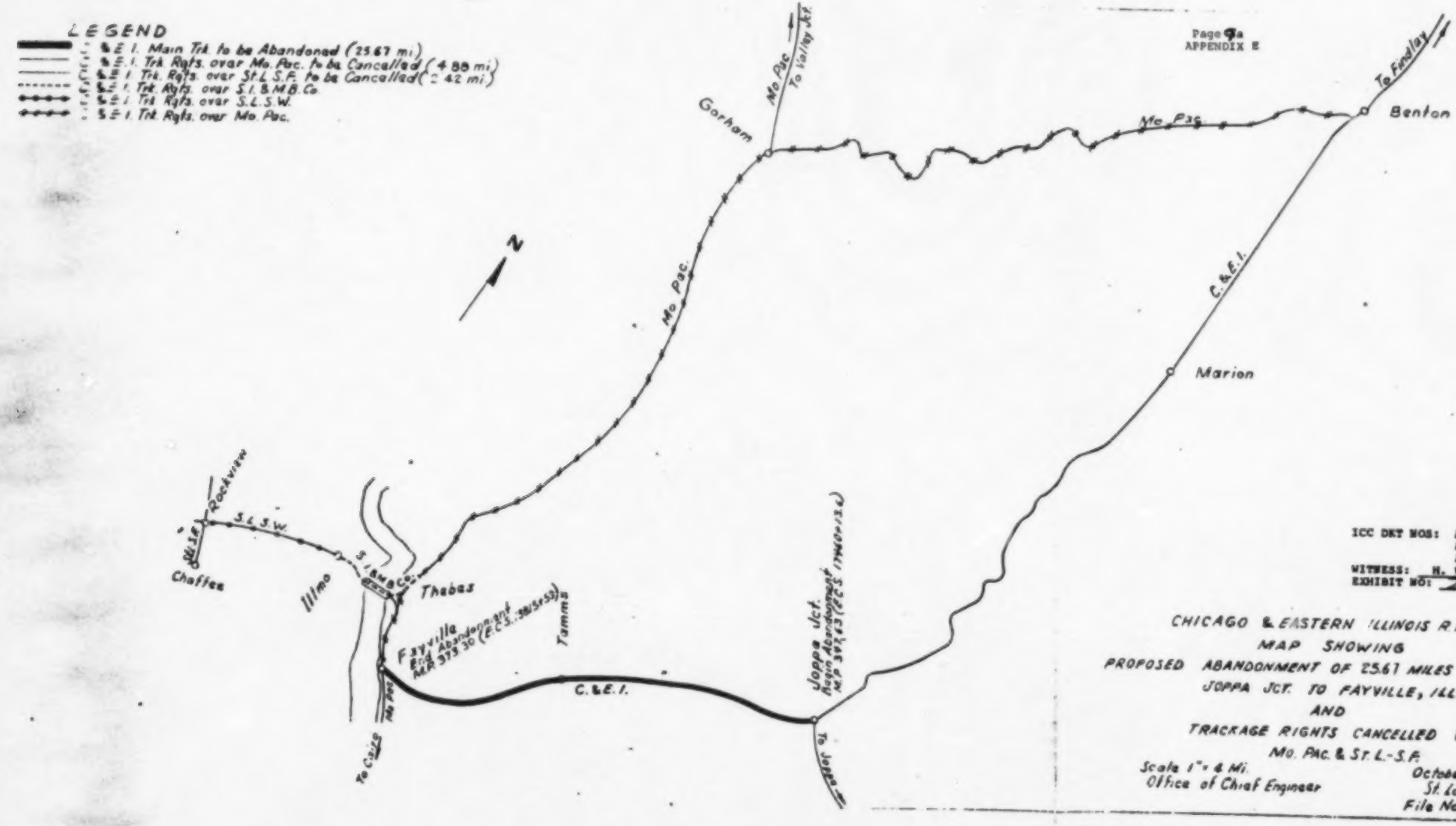
It is ordered, That, subject to the same conditions for the protection of employees as prescribed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, the acquisition by the Chicago & Eastern Illinois Railroad Company of trackage rights over the line of the Missouri Pacific Railroad Company, as described herein, upon said terms and conditions contained in the proposed agreement between the parties, submitted as part of the application, be, and is hereby, approved and authorized; and

It is further ordered. That no changes or modifications shall be made in the terms and conditions herein approved without prior authorization of the Commission; that this order shall be effective on the date of service hereof; that the applicant shall submit written notice to the Commission of the date the transaction herein authorized, is consummated, together with an executed copy of the proposed trackage rights agreement between the parties, hereinbefore referred to; and that unless the transaction authorized is consummated within 180 days from the effective date of this order, it shall be of no further force and effect.

By the Commission, Review Board Number 5.

H. Neil Garson,
Secretary.

(SEAL)



ICC DKT NOS: AB-11
AB-11 (Sub. 1)
AB-11 (Sub. 2)
WITNESS: H. W. RITTER
EXHIBIT NO:

CHICAGO & EASTERN ILLINOIS R.R. CO.
MAP SHOWING
PROPOSED ABANDONMENT OF 25.67 MILES OF MAIN TRK.
JOPPA JCT. TO FAYVILLE, ILL.
AND
TRACKAGE RIGHTS CANCELLED VIA
MO. PAC. & ST. L.-S.F.

Scale 1" = 4 Mi.
Office of Chief Engineer

October 11, 1972
St. Louis, Mo.
File No. H-713

Opposition

2

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1084

In the Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether conditions imposed by the Interstate Commerce Commission in a railroad control and merger proceeding preclude abandonment of a segment of line acquired in the earlier proceeding.

2. Whether the Commission abused its discretion by refusing to reopen an abandonment proceeding to consider the effect of a possible abandonment of a neighboring railroad line.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1084

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet reported. The final opinion of the Interstate Commerce Commission (Pet. App. 20a-38a) is unreported. The opinion of the Commission denying the petition to reopen the proceedings (Pet. App. 39a-44a) is unreported. The opinion of Division 1 of the Commission (Pet. App. 45a-53a) is reported at 354 I.C.C. 789. The opinion of the Administrative Law

Judge of the Interstate Commerce Commission (Pet. App. 54a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1981. A timely petition for rehearing was denied on November 3, 1981 (Pet. App. 18a). The petition for a writ of certiorari was filed on December 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of 49 U.S.C. (Supp. III) 10903(a) and 49 U.S.C. (Supp. III) 10904(d) are set forth at Pet. 2-3.

STATEMENT

In November 1972, the Chicago & Eastern Illinois Railroad Company (C&EI), predecessor in interest to the Missouri Pacific Railroad Company (MoPac), filed an application for a certificate of public convenience and necessity permitting abandonment of a 25.7 mile line of railroad between Joppa Junction, Illinois and Fayville Junction, Illinois (Joppa line).

An Administrative Law Judge (ALJ) denied the abandonment application, despite his finding that the line was being operated at a deficit (Pet. App. 65a and 67a). The ALJ found that the deficit was primarily the result of C&EI's decision to channel bridge traffic over its MoPac Benton-Thebes trackage rights route contrary to the DT&I traffic conditions imposed in *Missouri Pacific-Control-Chicago & E.I. R.R.*, 327 I.C.C. 279 (1965) (*Control case*). These conditions required C&EI to observe neutrality in handling in-

bound, outbound, and overhead traffic, and to keep routes via existing junctions and gateways open (Pet. App. 66a-67a).

In 1976, C&EI merged into MoPac. *Missouri Pacific-Merger-T&P & C&EI R.R.*, 348 I.C.C. 414 (1976), modified, 559 F.2d 408 (5th Cir. 1977) (*Merger case*). Accordingly, MoPac was substituted as the applicant in the abandonment proceedings. The Commission (Division 1) reversed the ALJ's decision and granted the application for abandonment. The decision was based essentially on the findings that (1) deficit operations over the line would continue; (2) shippers along the line would have adequate alternative motor and rail service available; and (3) the MoPac-C&EI merger had effectively eliminated the traffic conditions on which the ALJ had relied. See Pet. App. 49a-52a.

Several parties sought judicial review of the Commission's decision. On the Commission's motion, the court of appeals remanded the case for further proceedings. The Commission then sought and considered additional evidence, but affirmed the Division 1 decision with minor modifications and differences in analysis. Pet. App. 36a-37a. The Commission agreed that deficit operations were likely to continue since the future increases in traffic relied upon by the ALJ were speculative. The Commission explained, however, that, while the DT&I conditions were not eliminated by the merger, the purpose of the traffic conditions was to maintain external gateways and that the conditions were not intended to restrict a railroad's routing of traffic over its own lines through internal gateways. Pet. App. 34a-35a. Accordingly, the Commission again concluded that abandonment was permissible. Pet. App. 35a.

After the Commission's decision was published, the Illinois Central Gulf Railroad (ICG), placed its

Tamms/Cairo line in category 1 of its system diagram map, indicating that the line was expected to be the subject of an abandonment application within three years. Petitioners then filed a petition to reopen the administrative proceedings. Petitioners contended, among other things, that the alternative ICG rail service (Tamms/Cairo line) that the Commission had assumed would be available to the line's largest shipper, Tammsco, Inc., might not be available in the future, citing the category 1 designation of the line. The Commission denied the petition to reopen because the abandonment of the ICG line was wholly speculative. See Pet. App. 42a-43a.

Petitioners sought review of the Commission's decision in the court of appeals, arguing (1) that the DT&I traffic conditions created in the *Control case*, and continued in the *Merger case*, prohibited abandonment "as a matter of law"; and (2) that the Commission had erred in finding that the ICG could provide adequate alternative rail service for Tammsco, Inc. The court rejected petitioners' first argument essentially because the Commission's construction of the scope of the DT&I conditions and the relevant statutory provisions showed that abandonment proceedings must be considered on their merits (Pet. App. 9a):

> We believe that anti-competitive factors should be considered in approving abandonments. But, although an anti-competitive effect of the type barred by the DT&I conditions may be one factor relevant to the overall abandonment decision, it does not follow that such an effect would necessarily have a sufficient negative impact on public convenience and necessity to require the rejection of an abandonment. The existence of a condition

> that a railroad must "keep open all routes" does not *per se* prohibit an abandonment.

The court then reviewed the record and concluded that petitioners had failed to show any conflict between the purposes of the DT&I conditions and the consequences of the abandonment through evidence of harm to the competitive posture of other carriers or of shippers along the line (Pet. App. 9a).

In support of their second argument, the petitioners asserted that ICG might soon abandon the line serving Tammsco. The court rejected the argument, stating (Pet. App. 16a):

> Absent a clear showing why different treatment is required, each abandonment proceeding must be decided on its own merits. *Illinois* v. *I.C.C.*, 615 F.2d 743, 749 (7th Cir. 1980). Further, if we were to consider every prospective (and presently hypothetical) abandonment as relevant to the one before us, we might never bring any case to a close. See *I.C.C.* v. *City of Jersey City*, 322 U.S. 503, 514-15 (1944).

ARGUMENT

1. A railroad may abandon an interstate rail line only if the Commission finds "that the present or future public convenience and necessity require or permit the abandonment * * *." 49 U.S.C. (Supp III) 10903(a). In considering whether a particular line can be abandoned, the Commission must balance the needs of those served by the line against the burden of continued operation on the carrier and the interests of the national transportation system. See *Colorado* v. *United States*, 271 U.S. 153, 168 (1926); see generally *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

The decision of the Seventh Circuit in this case does not conflict with any decision of this Court or any other court of appeals. This case involves little more than the application of settled principles to the facts of this particular case.

2. Petitioners argue (Pet. 13-15) that the court of appeals erred in its construction of the DT&I traffic conditions established in the *Control case*. That claim is without merit. As the court of appeals correctly noted (Pet. App. 7a), the Commission has not construed the DT&I conditions to preclude subsequent abandonment. See *Chicago & N.W. Ry.-Purchase-Minneapolis & St. L. Ry.*, 312 I.C.C. 285, 295 (1960).[1] Unless the Act requires a contrary result, the Commission's interpretation of the conditions that it imposed should be dispositive. See Pet. App. 9a & n.14.

Section 5(2)(c), 49 U.S.C. 5(2)(c), provided that in acquisition or merger proceedings the Commission was to consider at least (Pet. App. 8a; emphasis added):

> (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) *the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction*; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

As recodified (49 U.S.C. (Supp. III) 11344(b), as amended by Pub. L. No. 96-448, 94 Stat. 1931), this provision now expressly directs the Commission to consider "whether the proposed transaction would

---

[1] Thus, contrary to the implication of the petition (at 13-14), the Commission's interpretation of the DT&I conditions in this case does not represent any change in policy.

have an adverse effect on competition among rail carriers in the affected region." Thus, in fashioning merger conditions, the Commission properly takes into account potential anti-competitive consequences, and there is nothing that requires the Commission to preclude future abandonments.

An abandonment requires the Commission to balance the needs of those being served by the line against the burden of continued operations on the carrier and the interests of the national transportation system. See *Colorado* v. *United States, supra*; *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co., supra.* As the court of appeals explained (Pet. App. 9a):

> although an anti-competitive effect of the type barred by the DT&I conditions may be one factor relevant to the overall abandonment decision, it does not follow that such an effect would necessarily have a sufficient negative impact on public convenience and necessity to require the rejection of an abandonment. The existence of a condition that a railroad must "keep open all routes" does not *per se* prohibit an abandonment.

The record supports the court of appeals' determination that petitioners failed to show any conflict between the purposes of the DT&I conditions and the consequences of MoPac's abandonment. There is no substantial evidence of harm to the competitive posture of other carriers or of shippers along the line (Pet. App. 9a-10a).

3. Petitioners also contend (Pet. 15) that the court of appeals erred in not requiring the Commission to reopen the abandonment proceeding when the ICG placed a neighboring line on its system diagram map. The court below correctly rejected petitioners' asser-

tion and sustained the Commission's exercise of its discretion to refuse to reopen a proceeding that has been pending in various stages for nearly a decade.

As noted above, after ICG placed its Tamms/Cairo line in category 1 on its system diagram map, petitioners filed a petition to reopen the administrative proceeding. Petitioners contended, among other things, that there were changed circumstances in that the alternative ICG rail service (Tamms/Cairo line), which the Commission had assumed would remain available to the line's largest shipper, Tammsco, Inc., might not be available in the future. The only basis for this assertion was ICG's placing of the line in the category 1 designation, which indicates that ICG anticipated filing an application for abandonment within three years. 49 C.F.R. 1121.20.

ICG's designation of track in category 1 of its system diagram map does not mean that an abandonment application will ever be filed. Furthermore, if such an application is eventually filed, the interests of shippers such as Tammsco will be considered. See Pet. App. 42a-43a. As the court of appeals correctly noted (Pet. App. 16a) "[a]bsent a clear showing why different treatment is required, each abandonment must be decided on its own merits. *Illinois* v. *I.C.C.*, 615 F.2d 743, 749 (7th Cir. 1980)." See also *Illinois* v. *United States*, 604 F.2d 519, 528 (7th Cir. 1979).

It is well established that a petition for reopening or rehearing is addressed to the sound discretion of the Commission, and that only a showing of the clearest abuse of discretion is sufficient to overturn a denial. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974).

No such showings have been made in this case. Moreover, the fact-bound claims of petitioners, concerning the decision to deny reopening in this particular case, clearly do not warrant consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

HENRI F. RUSH
Associate General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission

FEBRUARY 1982

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